Supreme Court, U.S.
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No. 06-

IN THE

Supreme Court of the United States

STACY A. GIBSON,

Petitioner,

v.

ADA COUNTY, *et al*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IDAHO

PETITION FOR WRIT OF CERTIORARI

APPENDIX – VOLUME I

APPENDICES No. 1 – No. 57

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APPENDIX 1 – OPINION OF THE IDAHO SUPREME COURT, FILED FEBRUARY 9, 2006

IN THE SUPREME COURT
OF THE STATE OF IDAHO

Docket Nos. 29694/30976/31553

2006 Opinion No. 10

Boise, September 2005 Term

Filed: February 9, 2006

Stephen W. Kenyon, Clerk

STACY A. GIBSON[1],

Plaintiff-Appellant,

v.

ADA COUNTY, a political subdivision of Idaho; ADA COUNTY SHERIFF'S OFFICE; VAUGHN KILLEEN, acting individually and in his official capacity under color of State Law as Ada County Sheriff; R. MONTE MACCONNELL, acting individually and in his official capacity under color of State Law as Legal Advisor to the Ada County Sheriff; ARVILLE GLENN, acting individually and in his official capacity under color of State Law as a law enforcement official for Ada County under the Sheriff; SCOTT JOHNSON, acting individually and in his official capacity under color of State Law as a law enforcement official for Ada County under the Sheriff; and DOES I thru X,

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[1] Idaho Supreme Court Docket No. 29694

Appendix 1

Defendants-Respondents.

STACY A. GIBSON[2],

Plaintiff-Appellant,

v.

ADA COUNTY, a political subdivision and governmental agency of the State of Idaho, and the ADA COUNTY SHERIFF'S OFFICE,

Defendants-Respondents.

ADA COUNTY[3],

Plaintiff-Respondent,

v.

STACY A. GIBSON,

Defendant-Appellant.

Appeal from the District Court of the Fourth Judicial District for Ada County. Honorable Ronald J. Wilper, District Judge and Joel D. Horton, District Judge.

The orders of the district court are affirmed.

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[2] Idaho Supreme Court Docket No. 30976

[3] Idaho Supreme Court Docket No. 31553. This listing of parties was absent from Opinion No. 10 released by the Idaho Supreme Court on February 9, 2006.

Appendix 1

Vernon K. Smith, Jr., Boise, for appellant.

Ada County Prosecuting Attorney, Boise, for respondents. Ray J. Chacko argued.

SCHROEDER, Chief Justice

Three separate cases involving Stacy Gibson (Gibson) and Ada County, et al (Ada County) have been consolidated in this appeal.

I.

FACTUAL AND PROCEDURAL BACKGROUND

Gibson was hired as a Records Technician II with the Ada County Sheriff's Department (ACSD) in 1997. She eventually became a tenured employee in this position, terminable only for cause.

Approximately one week prior to receiving a paycheck, Gibson signed a pay voucher stating:

> I STATE THAT THIS CLAIM HAS BEEN EXAMINED BY ME AND NO OTHER HOURS OR MONIES ARE DUE ME FOR OVERTIME....I REALIZE SIGNING THIS CLAIM AUTHORIZES THE COUNTY TO PAY ME THE AMOUNT SHOWN AND THAT A GRIEVANCE MAY BE FILED WITHIN 5 DAYS IF I DISAGREE WITHOUT LOSS OF ANY PAY.

Appendix 1

In May of 1998 Gibson began participation in the ACSD's direct deposit program which authorized ACSD to deposit Gibson's monthly paychecks into her personal checking account and, "if necessary, debit entries and adjustments for any credit entries in error to [her] account. . . ." Thereafter, Gibson's paychecks were directly deposited, but she continued to receive and sign pay vouchers approximately one week prior to each payday.

In the fall of 1998 Gibson was promoted to the position of Jail Technician II, which paid $1,550 per month plus overtime, a $50 per month increase over her former base salary. In the course of changing Gibson's pay rate an error occurred which combined Gibson's base pay as Jail Technician II with that of her former Records Technician II position. From November 1998 through June 1999, Gibson signed pay vouchers authorizing the ACSD to pay her $3,050, plus overtime equaling $100 to $700, per month. The ACSD paid the amounts shown on the pay vouchers, resulting in Gibson being paid for two positions instead of one.

In June or July of 1999 the ACSD discovered it had overpaid Gibson $8,500 over the course of eight months. The ACSD began an internal and criminal investigation into Gibson's actions regarding the overpayment of funds and concluded that she had knowingly signed pay vouchers indicating that her base salary was $3,050 when she knew her base salary was only $1,550. On August 2, 1999, Sheriff Vaughn Killeen (Killeen) sent Gibson a letter expressing his intent to terminate her on the grounds that she: (1) conducted herself in a "manner as to be detrimental to the good order and discipline of the department;" (2) "made a materially misleading statement in an official report;" and (3) "conducted [her]self in such a manner as to reflect unfavorably on th[e]

department and [her]self." The letter stated that the facts giving rise to Gibson's termination were: (1) she knowingly accepted salary overpayments; and (2) she did nothing to correct the overpayments or repay the monies erroneously paid to her. The letter also advised Gibson of her right to appeal.

Gibson appealed. An Ada County personnel hearing officer (hearing officer) heard the matter on January 25 and 26, 2000, and on February 15, 2000, affirmed Killeen's decision to terminate Gibson. Gibson filed a petition for judicial review with the district court pursuant to Ada County Code § 1-7G-3(o). The district court addressed the matter under the standard of review set forth in the Idaho Administrative Procedure Act (IAPA) and I.C. §§ 67-5277, 67-5279, and affirmed the hearing officer's decision. Gibson appealed to this Court which vacated the decision of the district court and dismissed Gibson's claims without prejudice, finding that no statutory authority exists to grant judicial review of a county personnel hearing officer's findings of fact and conclusions of law. *Gibson v. Ada County Sheriff's Dep't*, 139 Idaho 5, 72 P.3d 845 (2003) [hereinafter *Gibson I*]. *Gibson I* noted that were the appeal from the Ada County Board of Commissioners (Board), the Supreme Court would have a right of review, and the appropriate standard would be based on IAPA.

A second action arose on July 19, 2002, when Gibson filed a complaint and demand for jury trial in district court alleging, among other things, civil rights violations on the part of the ACSD under 42 U.S.C. §§ 1981, 1983 and 1985(3). The district court dismissed the complaint, determining that the two-year statute of limitations had run, the complaint did not allege facts supporting a claim of racial discrimination, an essential element of a claim under 42 U.S.C. § 1981, and no notice of a tort claim had been filed which barred such actions

insofar as any of Gibson's claims were for common law tort. Gibson appealed the district court's decision. That appeal is hereinafter referred to as *Gibson II*.

Following this Court's decision in *Gibson I*, Gibson submitted a petition to the Board for a review of the hearing officer's January 2000 decision. The Board denied Gibson's request on the grounds that the Idaho Constitution and Idaho case law suggest the decision to hire and fire deputies is left to the sole discretion of an elected official, which includes county sheriffs. On June 4, 2003, Gibson submitted a petition for hearing to the Board. The members of the Board sent a letter to counsel for Gibson dated July 2, 2003, which stated that the Board was unable to hold the requested hearing. Several motions were filed thereafter, including Gibson's Motion to Remand to Ada County Board of Commissioners for Creation of an Agency Record with an Evidentiary and Due Process Hearing, Pursuant to Idaho Code § 67-5242 and § 67-5249 and Rule 84, I.R.C.P. (Motion to Remand), her Petition for Judicial Review, and her Motion to Reconsider Interlocutory Order Conditionally Denying and Dismissing Petition for Judicial Review, with Leave to Amend the Pleadings to Include a Common Law Remedy.

On June 17, 2004, the district court entered an Order on Renewed Motion for Reconsideration and Final Order Denying Petition for Judicial Review, which denied her Petition for Judicial Review and her Renewed Motion to Reconsider the Interlocutory Order Conditionally Denying the Petition for Judicial Review (Motion to Reconsider). On appeal, Gibson raises issues regarding whether she is entitled to a declaratory judgment, whether the district court erred when denying her requests for judicial review, reconsideration, and a remand of

the case to the Board. This appeal is hereinafter referred to as *Gibson III.*

Ada County filed a suit seeking repayment of $8,528.89 that had been overpaid to Gibson. Several motions were made among the parties, including a motion filed by Ada County for summary judgment. On December 6, 2004, the district court issued its Memorandum Decision and Order that granted Ada County's Motion for Summary Judgment, followed by a Judgment awarding Ada County $8,528.89, which is the basis of the appeal of *Gibson IV.*

All pending issues in the various actions have been consolidated in this appeal.

II.

STANDARD OF REVIEW

In reviewing the district court's order granting the motion to dismiss, the standard of review is the same as that used in summary judgment. *Rim View Trout Co. v. Idaho Dep't of Water Res.*, 119 Idaho 676, 677, 809 P.2d 1155, 1156 (1991). The standard of review on appeal from an order granting summary judgment is the same standard that is used by the district court in ruling on the motion. *Baxter v. Craney*, 135 Idaho 166, 170, 16 P.3d 263, 267 (2000). Summary judgment is appropriate only when the pleadings, depositions, affidavits and admissions on file show that there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. I.R.C.P. 56(c); *McCann v. McCann*, 138 Idaho 228, 232, 61 P.3d 585, 589 (2002).

"This Court has free review over the construction of a statute, *Waters Garbage v. Shoshone County*, 138 Idaho 648, 650, 67 P.3d 1260, 1262 (2003), which includes whether a statute provides for judicial review, and the standard of review to be applied if judicial review is available." *Hayden Lake Fire Protection Dist. v. Alcorn*, 141 Idaho 388, ___, 111 P.3d 73, 85 (2005). "Summary judgment is proper 'if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Samuel v. Hepworth, Nungester & Lezamiz*, 134 Idaho 84, 87, 996 P.2d 303, 306 (2000) (internal citations omitted).

III.

GIBSON II

A. ANY TORT BASED CLAIMS WERE PROPERLY DISMISSED FOR FAILURE TO FILE A NOTICE OF CLAIM.

Prior to bringing a suit for tort against a political subdivision or their employee for any act or omission arising out of the scope of employment, a party must file a notice of the claim with the secretary or clerk of the political subdivision. I.C. §§ 6-906, 6-908 (2003). This notice must be filed within 180 days of when the claim arose or reasonably should have been discovered, whichever is later. I.C. §§ 6-906, 6-908; *Cobbley v. City of Challis*, 138 Idaho 154, 157, 59 P.3d 959, 962 (2002); *McQuillan v. City of Ammon*, 113 Idaho 719, 722, 747 P.2d 741, 744 (1987). While Gibson apparently does not believe the complaint alleges tort claims, Counts III, IV, and VI broadly read allege causes of action for intentional

infliction of emotional distress and other related common law tort claims. Gibson did not file a notice of tort claims with ACSD. Gibson does not address these causes of action on appeal. To the extent the complaint alleges tort claims, these claims are barred. The district court properly dismissed such claims.

B. THE CLAIMS BASED ON 42 U.S.C. §§ 1981 AND 1985 WERE PROPERLY DISMISSED.

Gibson's remaining claims allege civil rights violations under Title 42 U.S.C. §§ 1981, 1983 and 1985. As correctly stated by the district court, 42 U.S.C. § 1981 requires an allegation of a race-based classification or discrimination. *Runyon v. McCrary*, 427 U.S. 160, 168, 96 S.Ct. 2586, 2593 (1976); *Pavon v. Swift Transp. Co., Inc.*, 192 F.3d 902, 908 (9th Cir. 1999). Gibson has not alleged any facts suggesting discrimination on the basis of race, class or color. The district court properly dismissed the claims pursuant to § 1981.

The district court dismissed Gibson's § 1985(3) claim on the grounds that it was barred by the statute of limitations. This claim may be also dismissed on the alternative ground of failure to allege a race or class-based discrimination. Title 42 U.S.C. § 1985(3) requires "that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirator's action." *Stevens v. Rifkin*, 608 F.Supp. 710, 719 (D.C. Cal. 1984) (citing *Griffin v. Beckenridge*, 403 U.S. 88, 101-02, 91 S.Ct. 1790, 1798 (1971)). Gibson has failed to allege any facts suggesting conspiracy on the part of ACSD or its employees to discriminate on the basis of race or class. Regardless of the statute of limitations issue, Gibson's § 1985(3) claim was properly dismissed.

C. GIBSON WAS NOT REQUIRED TO EXHAUST ADMINISTRATIVE REMEDIES PRIOR TO FILING HER 42 U.S.C. § 1983 CIVIL RIGHTS CLAIM BUT COULD CHOOSE TO DO SO.

Title 42 U.S.C. § 1983 (2004) provides a cause of action for "anyone who is deprived, by a person acting under color of state law, of rights secured by the United States Constitution or federal law." *Bryant v. City of Blackfoot*, 137 Idaho 307, 314, 48 P.3d 636, 643 (2002). The Fourteenth Amendment protects persons against deprivation of a property or liberty interest without due process of law. U.S. CONST., art. XIV. Public employment is included within the realm of those interests protected under the Fourteenth Amendment. *Bd. of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701 (1972); *Harkness v. City of Burley*, 110 Idaho 353, 355, 715 P.2d 1283, 1285 (1986). In Idaho a permanent or classified employee whose employment is not terminable at will has a due process property interest in continued employment. *Harkness*, 110 Idaho at 356, 715 P.2d at 1286 (citing *Allen v. Lewis-Clark State College*, 105 Idaho 447, 460 n. 6, 670 P.2d 854, 867 n. 6 (1983)). Thus, wrongful termination of a classified employee gives rise to a § 1983 claim for violation of a due process property right in continued state employment.

Civil rights claims arising under 42 U.S.C. § 1983 are governed by federal law. *Henderson v. State*, 110 Idaho 308, 310, 715 P.2d 978, 981 (1986). The U.S. Supreme Court and several federal circuits have held that it is not a prerequisite to filing a § 1983 claim that a party must exhaust all state administrative remedies. *Patsy v. Bd. of Regents of the State of Florida*, 457 U.S. 496, 501, 102 S.Ct. 2557, 2560 (1982); *Ellis v. Dyson*, 421 U.S. 426, 432, 95 S.Ct. 1691, 1695 (1975). However, to the extent an agency's decision must be ripe for

review, administrative remedies may be required. *See Raper v. Lucy*, 488 F.2d 748, 750 n.3 (1st Cir. 1973). *Raper* involved a § 1983 claim for deprivation of due process in the denial of a motor vehicle license. The court found that although exhaustion was not a prerequisite to filing a § 1983 claim "there must be *at least some definitive administrative or institutional determination* before [an] action may arise." *Raper*, 488 F.2d at 751 n.3 (emphasis added). The court found this view consistent with a previous holding that "reference to local institutional authority as may be necessary to assure that the action complained of is final . . . in the sense that is ripe for adjudication" is proper in the school employment context. *Id.* (quoting *Stevenson v. Bd. of Educ.*, 426 F.2d 1154, 1157 (5th Cir.) *cert. den.*, 400 U.S. 957 (1970)). Therefore, to the extent administrative remedies are part of a final agency action, exhaustion may be required.

Idaho Code § 67-5271(1) provides that "[a] person is not entitled to judicial review of an agency action until that person has exhausted all administrative remedies . . . ." I.C. § 67-5271(1) (2003). Notably this portion of IAPA governs judicial review of *state* rather than *local* agency actions. *Idaho Historic Pres. Council, Inc. v. City of Boise City Council*, 134 Idaho 651, 653, 8 P.3d 646, 647 (2000). However, where a local agency action is appealed to a state agency body, IAPA applies to judicial review of that state agency's decision. I.C. § 67-5201 (2003). Ada County Code § 1-7H-1(A) requires that a classified employee utilize the procedures outlined in the Ada County Code for redress of any "difficulty or problem he or she may have with any aspect of his or her employment . . ." A.C.C. § 1-7H-1(A) (2004). Review of an elected official's decision to dismiss a classified employee must be submitted in writing to the Ada County personnel director who then

forwards the request to the Ada County personnel hearing officer for a formal hearing. A.C.C. § 1-7G-3(L) (2000). Ada County Code § 1-7G-3(O) then allows for appeal of a hearing officer's decision to a district court of proper jurisdiction.

Gibson sought judicial review of Ada County's decision to terminate her employment consistent with I.C. § 62-5271(3), A.C.C. §§ 1-7G-3(L), 1-7G-3(O) and 1-7H-1(A). She then elected to file a § 1983 claim in state court rather than in federal court pursuant to Title 28 U.S.C. § 1343 (2004). *Patsy* and the other similarly decided cases hold that Gibson was not required to exhaust her administrative remedies prior to filing suit. However, exhaustion of administrative remedies not being a prerequisite to filing a § 1983 claim is different than a holding that Gibson must file her § 1983 claim and forgo exhaustion of administrative remedies. Furthermore, *Raper* requires that some "definitive administrative decision" be made before a § 1983 claim arises. *Raper*, 488 F.2d at 751 n.3. The question is whether exhaustion of remedies was required to make Gibson's claim ripe for suit under § 1983. Simply stated in this case, was there a "definitive administrative decision" which triggered commencement of the statute of limitations?

Gibson maintains that the statute of limitations on her civil rights claims was tolled while she attempted to exhaust her administrative remedies arguing that: (1) the statute of limitations is tolled until an agency commits a "last act" and in this case the last act was the Board's refusal to grant her petition for review on July 2, 2003, (2) the statute of limitations was and is still tolled due to Ada County's continuing violations of the FLSA, and (3) the statute of limitations was and is still tolled because A.C.C. §§ 1-7G-1

through 1-7G-3 fail to comply with I.C. § 31-714 and constitutional due process provisions.

Ada County argues that the two-year statute of limitations in cases such as Gibson's begins to run on the day the harm is known. *See Delaware State Coll. v. Ricks*, 449 U.S. 250, 258, 101 S.Ct. 498, 504 (1980); *see also Chardon v. Fernandez*, 454 U.S. 6, 7-8, 102 S.Ct. 28, 29 (1981). According to Ada County, the last date on which Gibson bases her claims is February 15, 2000, the date on which she received notice of her termination, and, consequently, she was required to file her claim by February 15, 2002, some five months before the complaint was filed.

State law determines the length of the statute of limitations applicable to Title 42 U.S.C. § 1983 claims. *See Henderson*, 110 Idaho at 310, 715 P.2d at 981. This includes whether any state tolling provisions may apply. *Bd. of Regents v. Tomanio*, 446 U.S. 478, 484, 100 S.Ct. 1790, 1795 (1980). In Idaho there is a two-year statute of limitations on all § 1983 claims similar to personal injury actions. I.C. § 5-219(4) (2004); *Henderson*, 110 Idaho at 311, 715 P.2d at 981.

Although state law governs statute of limitations restrictions on § 1983, federal law governs when accrual of such claims begins. *Id.* According to *Henderson*, "federal law determines the 'last act' for purposes of tolling a state's statute of limitations." *Id.* (quoting *Briley v. California*, 564 F.2d, 849, 855 (9th Cir. 1977)). The generally accepted rule is that accrual begins when a "plaintiff knows or has reason to know of the injury which is the basis of their action." *Id.* (quoting *Cox v. Stanton*, 529 F.2d 47, 50 (4th Cir. 1975)).

Appendix 1

Accrual of the limitations period in the employment context has been most clearly discussed in *Delaware State Coll. v. Ricks*, 449 U.S. 250, 101 S.Ct. 498 (1980), and *Chardon v. Fernandez*, 454 U.S. 6, 102 S.Ct. 28 (1981). In *Delaware* plaintiff, Ricks, filed a § 1983 claim against defendant, Delaware State College, for alleged violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000-e et seq, for denying him tenure. *Delaware*, 449 U.S. at 250, 101 S.Ct. at 500. Although Ricks was orally notified tenure was denied he was offered a one-year terminal contract. Ricks argued it was the termination of this one-year contract rather than notice his tenure was denied that started accrual of his § 1983 claim. *Id.* The United States Supreme Court disagreed, finding, "[p]endency of a grievance or some other method of collateral review of an employment decision does not toll the running of the limitations period." *Id.* at 261, 101 S.Ct. at 506 (citing *Int'l Union of Elec., Radio & Mach. Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 97 S.Ct. 441 (1976)). It is the *decision constituting the discriminatory act* and not the consequences of that act which triggers the statute of limitations. "The proper focus is upon the time of the *discriminatory acts*, not upon the time at which the *consequences* of the acts became most painful." *Id.* at 257, 258, 101 S.Ct. at 504 (quoting *Abramson v. Univ. of Hawaii*, 594 F.2d 202, 209 (1979). This reasoning was later reiterated in *Chardon*, in which the Supreme Court held that a § 1983 claim accrued on the date a plaintiff received notice of termination of his employment rather than on the date plaintiff was actually terminated. *Chardon*, 454 U.S. at 7-8, 102 S.Ct. at 29. The Second Circuit has furthermore held that accrual of a § 1983 claim "doesn't require judicial verification that a defendant's acts were wrongful." *Halpern*, 52 F.Supp.2d 324, 329 (quoting *Veal v. Geraci*, 23 F.3d 722, 724 (2d Cir. 1994)).

Gibson relies on *Hoesterey v. City of Cathedral City*, 945 F.2d 317 (9th Cir. 1991), which found that a city manager's § 1983 claim could not accrue until the manager could be assured that the discharge decision was final and that it would not be followed by further process. *Hoesterey* distinguished both *Delaware* and *Chardon* on the grounds that these cases involved alleged discrimination in the actual decision to terminate the employee rather than the lack of process alleged as the discriminatory act in *Hoesterey*. *Id.* at 320.

Likewise, in *McCoy v. City & County of San Francisco*, 14 F.3d 28 (9th Cir. 1994), the Ninth Circuit held that accrual of a § 1983 claim challenging a police officer's suspension did not accrue until a final written decision had been given by the Police Commission, despite that an oral decision from the Commission had already been made. *Id.* at 28-30. In *McCoy*, however, the written decision of the Personnel Commission took the form of final decision of the agency. *Id.* at 30. *See also Hill v. Tennessee*, 868 F.Supp. 221, 224 (M.D. Tenn. 1994) (Title 42 U.S.C. § 1983 claim accrued on the date a State Supreme Court denied a plaintiff's request for appeal of a forfeiture rather than on the date the initial forfeiture decision was made). Thus to the extent awaiting the Commission's final written decision constituted final agency action, a discriminatory act had to occur from which McCoy could base a § 1983 cause of action.

Finally, in *Norco Const. v. King County*, 801 F.2d 1143 (9th Cir. 1986), the Ninth Circuit found that a plaintiff whose application for preliminary plat approval had been unreasonably delayed was not injured until the county commission actually rendered its final decision regarding the plat, regardless of whether the plaintiff knew that his lot had been taken without due process of law at an earlier date. *Id.* at

1145. The discriminatory act in *Norco* was the unnecessary delay in acceptance of the plaintiff's application as compared with other applications which had received faster review. Naturally this injury could not be determined until the commission had officially acted.

Gibson argues that she was discriminated against in her actual termination as well as in the interrogation process leading up to her termination. Her complaint does not specifically allege deprivation of due process in the grievance procedures themselves, although this does appear to be part of her argument on appeal. She maintains that the Board's refusal to grant review of the hearing officer's decision constitutes an ongoing deprivation of her due process rights. Notably, the complaint was filed prior to the Board's decision to deny review. However, whether the Board's decision allowed Gibson proper procedural due process is not the issue before this Court. The question is whether there has been a definitive administrative decision or whether accrual for purposes of the statute of limitations awaits a final resolution of the question of whether the Board was required to hear her claim.

Gibson's Complaint is unlike that of *Hoesterey* where the alleged discriminatory act was failure of the employer to grant a pre-termination hearing. Gibson was given a pre-termination hearing by way of the hearing conducted on February 15, 2000. Her Complaint reveals no allegations of discrimination in this review process. Moreover, her notice of termination as well as the Hearing Officer's decision are sufficient to satisfy the ripeness standard articulated in *Raper*, as they constitute a final decision as to the status of Gibson's employment. Thus Gibson's case is similar to that of *Delaware* and *Chardon*. Accrual of her § 1983 claim began on February 15, 2000, with the hearing officer's final decision to terminate.

Finally, Gibson's argument that Ada County's continuing violations of the Fair Labor Standards Act (FLSA) tolled the statute of limitations on her § 1983 claim is without merit for two reasons. Title 29 U.S.C. § 211(c) provides that an employer is required to keep accurate records of wages, hours, conditions and practices of employment. 29 U.S.C. § 211(c) (2004). This provision of the FLSA does not confer a federal right upon an employee to form the basis of a § 1983 claim. *See, e.g., Brock v. Bowen Mfr. Hous., Inc.*, 681 F.Supp. 1224 (W.D. Tex. 1987) (29 U.S.C. § 211(c) requires an employer to keep accurate records). Additionally, Gibson asserts § 1983 claims based on Ada County's alleged violations of 29 U.S.C. §§ 207(k) and 215(a)(3). However, 29 U.S.C. § 216(b) provides a cause of action and damages for violations of such provisions of the FLSA. Where an extensive statutory scheme has already been created to provide relief for a federal right, this Court has held that a party is obligated to use that statutory scheme and not a § 1983 action. *Bryant v. City of Blackfoot,* 137 Idaho 307, 314, 48 P.3d 636, 643 (2002). Thus the statute of limitations was not tolled by any alleged failure to maintain accurate records by Ada County.

Idaho has a two-year statute of limitations on all 42 U.S.C. § 1983 claims. *Henderson*, 110 Idaho at 311, 715 P.2d at 981. Gibson's § 1983 claim began to accrue on February 15, 2000, when the hearing officer made his decision. She filed her § 1983 claim on July 19, 2002, five months past the statute of limitations. Her claim is timebarred. The district court properly dismissed her claim.

D. NEITHER PARTY IS ENTITLED TO ATTORNEY FEES.

Appendix 1

Idaho Code § 12-117 mandates an award of attorney fees to the prevailing party of a civil suit against a state agency "if the court finds that the party against whom the judgment is rendered acted without a reasonable basis in fact or law." I.C. § 12-117(1) (2003). A county is not a state agency within the meaning of this statute. *IHC Hosps. v. Bd. of Comm'rs*, 117 Idaho 207, 212, 786 P.2d 600, 606 (Ct. App. 1990). Where a prevailing party is not subject to I.C. § 12-117 attorney fees may not be awarded. *Horne v. Idaho State Univ.*, 138 Idaho 700, 706, 69 P.3d 120, 126 (2003) (in an employee's termination of employment case university was not entitled to attorney fees under 12-117 because university was not a "state agency" within meaning of the statute). Ada County is not a state agency within the meaning of I.C. § 12-117. More fundamentally, Gibson is not a prevailing party.

Idaho Code § 12-121 allows a court to award reasonable attorney fees to a prevailing party. I.C. § 12-121 (2003). "Party" includes the State of Idaho and its political subdivisions. I.C. § 12-121. Generally attorney fees will be awarded under this section where "an appeal was brought pursued or defended frivolously, unreasonably or without foundation." *Waters Garbage v. Shoshone County*, 138 Idaho 648, 653, 67 P.3d 1260, 1265 (2003). All but one of Gibson's claims were dismissed on alternate grounds not addressed by Gibson on appeal. The § 1983 civil rights claim is time-barred as was found by the district court. Although Gibson is unsuccessful in her appeal, it does not appear that she pursued this appeal frivolously, unreasonably or without foundation. She made a good faith argument based on relevant authority that the statute of limitations was tolled. An award of attorney fees to Ada County under I.C. § 12-121 is not appropriate.

Appendix 1

GIBSON III

A. THE DISTRICT COURT DID NOT ERR WHEN DENYING GIBSON'S PETITION FOR JUDICIAL REVIEW.

Idaho Code § 31-1506 provides that a person is entitled to initiate judicial review of any "act, order or proceeding" of the Board and the merits of the subject matter would be subject to review and the IAPA standard of review would apply. Gibson contends the Board's nonaction regarding her requested hearing constitutes an "act, order or proceeding" and she is entitled to judicial review. She also argues this Court confirmed in *Gibson I* that judicial review under I.C. § 31-1506 became applicable after Gibson went before the Board.

Idaho Rule of Civil Procedure 84 provides guidance regarding judicial review by a district court of agency actions. It provides:

> The procedures and standards of review applicable to juridical review of state agency and local government actions shall be as provided by statute. When judicial review of an action of a state agency or local government is expressly provided by statute but no stated procedure or standard of review is provided in that statute, then Rule 84 provides the procedure for the district Court's judicial review. *Actions of state agencies or officers or actions of a local government, its officers or its units are not subject to judicial review unless expressly authorized by statute*. Rule 84 does not apply to the issuance of writs of mandate, prohibition, quo warranto, certiorari, review, or other common law or equitable writs, but petitions for judicial review

> under this rule may be filed with or in the alternative to petitions for these common law or equitable writs.

I.R.C.P. 84(a)(1) (2005) (emphasis added). This Court has already discussed whether the district court has the authority to review the Sheriff's decision to terminate Gibson's employment. In *Gibson I* this Court held:

> Statutes may also authorize judicial review without invoking the provisions of the IAPA. I.R.C.P. 84(a)(1). The rule, however, states "actions of a local government, [or] its officers . . . are not subject to judicial review unless expressly authorized by statute." I.R.C.P. 84(a)(1). There is no statute authorizing judicial review of a decision by the county personnel hearing officer. Therefore, this matter is not subject to review pursuant to I.R.C.P. 84.

Gibson I, 139 Idaho 5, 8, 72 P.3d 845, 848 (2003). Since that case was released in 2003, Gibson has failed to identify any statute that provides authority allowing the Board to review the personnel decision of an elected County officer. She claims this Court "confirmed" that she is entitled to judicial review under I.C. § 31-1506 after she went before the Board. It appears that she is referring to the Court's following statements: "[H]ad Gibson appealed the county personnel hearing officer's decision to the [board], the board's decision would be an appropriate subject for judicial review and IAPA standard of review would apply. I.C. § 31-1506(1). Without action of the board, however, the judicial review provisions of I.C. § 31-1506(1) are inapplicable." *Id.* This Court's language was not a mandate for the district court to review the sheriff's decision. The Court ruled that I.R.C.P. 84 required a statute exist that provided authority for judicial review. This Court in

no way indicated it could provide an alternate means for the district court to review the officer's decision in this situation. Furthermore, even if this Court attempted to provide such authorization, it would not satisfy I.R.C.P. 84.

Gibson alleges the Board's refusal to review the sheriff's decision to terminate her employment constitutes an "action" as used in I.C. § 31-1506(1). "This Court has free review over the construction of a statute, *Waters Garbage v. Shoshone County*, 138 Idaho 648, 650, 67 P.3d 1260, 1262 (2003), *which includes whether a statute provides for judicial review*, and the standard of review to be applied if judicial review is available." *Hayden Lake Fire Protection Dist. v. Alcorn*, 141 Idaho 388, ___, 111 P.3d 73, 85 (2005) (emphasis added). Idaho Rule of Civil Procedure 84 clearly states that a statute must "expressly" authorize that an action of an officer is subject to judicial review. Idaho Code § 31-1506(1) does not satisfy I.R.C.P. 84 because it does not specifically authorize judicial review in this instance.

Finally, Gibson cites A.C.C. § 1-14-1 through § 1-14-8 as support for her position. This Court plainly stated that "A County Ordinance Cannot Authorize Judicial Review," in a title heading in *Gibson I.*

This Court affirms the district court's decision to deny Gibson's Petition for Judicial Review and adopt its findings that: "Pursuant to Rule 84, I.R.C.P., a petition for judicial review will only lie if permitted by statute. There exists no statute or constitutional authority under Idaho law allowing a Board of County Commissions to review the personnel decision of other elected County officers."

B. THE DISTRICT COURT DID NOT ERR WHEN DENYING GIBSON'S MOTION TO REMAND.

Gibson argues the district court erred when denying her motion to remand the case to the Board. She alleges she has been deprived of her right to due process because of the Board's failure to make findings of fact. However, if judicial review is not proper, an argument that the Board needed to make findings of fact is nonsensical. If I.R.C.P. 84 does not authorize the Board to review decisions of other elected officials, it would be ineffective for the district court or this Court to find that Gibson's motion to remand should be granted to make findings of fact. The district court correctly denied Gibson's motion to remand.

C. GIBSON IS NOT ENTITLED TO A DECLARATORY JUDGMENT.

Gibson requests this Court to issue a declaratory judgment against Ada County proclaiming A.C.C. § 1-7G-3 (O) and various provisions of the merit system, A.C.C. § 1-7-1 through § 1-7L-10, unconstitutional, repugnant in law, contrary to procedural due process requirement, and entitle appellant to employment reinstatement with rank, seniority, benefits, privileges, and back pay. She contends this Court has original jurisdiction to issue such a declaratory judgment pursuant to I.C. § 10-1202, which states:

> Any person interested under a deed, will, written contract or other writings constituting a contract or any oral contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the

> instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

It appears Gibson has ignored another Idaho Code section that clarifies how one properly requests a declaratory judgment. Idaho Code § 67-5272(1) states: "Except when required by other provision of law, proceedings for review or declaratory judgment are instituted by filing a petition in the district court." Additionally, Article V, section 9, of the Idaho Constitution sets forth situations in which this Court has original jurisdiction. Under the Idaho Constitution, this Court has original jurisdiction "to issue writs of mandamus, certiorari, prohibition, and habeas corpus, and all writs necessary or proper to the complete exercise of its appellate jurisdiction." Noticeably, issuing declaratory judgments is not included. Gibson's request is outside the scope of this appeal and, therefore, this Court declines to review it.

D. ADA COUNTY IS ENTITLED TO ATTORNEY FEES ON APPEAL.

An award of attorney fees pursuant to I.C. § 12-121 is appropriate "when this Court has the abiding belief that the appeal was brought or defended frivolously, unreasonably or without foundation." *Risk v. Royal Caribbean Cruises, Ltd.*, 141 Idaho 290, ___, 108 P.3d 990, 995 (2005) (citing *Lovelass v. Sword,* 140 Idaho 105, 109, 90 P.3d 330, 334 (2004). Gibson argues on appeal that the district court erred when denying her request for judicial review. However, after repeated direction from the district court and guidance from this Court regarding this particular case, she still has not cited a statute that authorizes the Board to review the personnel decision of other elected County officers as required by I.R.C.P. 84. She also

appealed the district court's denial of her Motion to Remand. As previously discussed, it is illogical to argue her Motion to Remand should be granted if she cannot provide authority upon which a court could grant her Petition for Review. Finally, Gibson requests this Court to issue a declaratory judgment against Ada County proclaiming A.C.C. § 1-7G-3 (O) and various provisions of the merit system unconstitutional, repugnant in law, contrary to procedural due process requirement, and entitling her to employment reinstatement with rank, seniority, benefits, privileges, and back pay. She attempts to have this Court accept her statement that I.C. § 10-1202 provides this Court with original jurisdiction to issue such a declaratory judgment as true, when such a contention is not even debatable. This Court finds Gibson brought this appeal frivolously, unreasonably or without foundation and awards attorney fees to Ada County.

GIBSON IV

A. THE DISTRICT COURT DID NOT ERR WHEN GRANTING ADA COUNTY'S MOTION FOR SUMMARY JUDGMENT.

The district court issued a Memorandum Decision and Order that granted Ada County's motion for summary judgment, followed by a Judgment awarding Ada County $8,528.89. The proper standard of review is as follows:

> When this Court reviews a district court's grant of summary judgment, it uses the same standard properly employed by the district court originally ruling on the motion. Summary judgment is proper "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as

> to any material fact and that the moving party is entitled to a judgment as a matter of law." This Court construes the record in the light most favorable to the non-moving party, and draws all reasonable inferences in favor of that party. If reasonable minds might come to different conclusions, summary judgment is inappropriate. "[A] mere scintilla of evidence or only slight doubt as to the facts" is not sufficient to create a genuine issue for purposes of summary judgment. The non-moving party "must respond to the summary judgment motion with specific facts showing there is a genuine issue for trial."

Samuel v. Hepworth, Nungester & Lezamiz, 134 Idaho 84, 87, 996 P.2d 303, 306 (2000) (internal citations omitted). Additional guidance is provided by I.R.C.P. 56(e), which states in part:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of that party's pleadings, but the party's response, by affidavits or as otherwise provided in this rule, must set forth *specific facts showing that there is a genuine issue for trial*. If the party does not respond, summary judgment, if appropriate shall be entered against the party.

(Emphasis added).

When granting Ada County's Motion for Summary Judgment, the judge ruled that Gibson was unjustly enriched, the elements of which are: "(1) a benefit is conferred upon defendant by plaintiff, (2) appreciation by the defendant of the benefit, and (3) acceptance of the benefit under circumstances

that would be inequitable for the defendant to retain the benefit without payment of the value thereof." *Aberdeen-Springfield Canal Co. v. Peiper*, 133 Idaho 82, 88, 982 P.2d 917, 923 (1999). The district court found Gibson was receiving two salaries, that she did appreciate and accept the benefit of the overpayments, and it is inequitable for Gibson to retain the overpayments. The district court noted that Gibson argued there is a discrepancy in the amount of overpayment, as she does on appeal. The district court disagreed with Gibson, noting she "failed to provide any accounting of her own" and that Kelli Bolicek, the Finance Manager of the County Sheriff's Office, and Cheryl Bower, the Controller at the County Clerk/Auditor/Recorder's Office, were competent to provide information regarding the amount of overpayment.

Gibson claims the district court erred when it ruled that she "failed to provide any accounting of her own." She claims she provided a detailed accounting in her Second Amended Counterclaim. A review of the 55-page amended counterclaim reveals that she did not provide an accounting of her own. Though she previously acknowledges she was overpaid, she fails to set forth an exact amount of what she believes was overpaid. While she includes a chart that shows wages due, the numbers indicate they are estimations. Another chart indicates the number of overtime hours she claims to have worked, though it does not contain the amount of payment owed for the hours she claims to have worked. As stated by this Court, a "mere scintilla of evidence" is not sufficient to preclude summary judgment. *Samuel*, 134 Idaho at 87, 996 P.2d at 306. Specific facts are necessary to show there is a genuine issue of material fact and this Court affirms the district court's ruling that Gibson has failed to meet this standard.

Gibson makes the additional argument that the district court decision should be reversed because it failed to set forth findings of fact. Idaho Rule of Civil Procedure 52(a) states that, "[f]indings of fact and conclusions of law are unnecessary . . . on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b) . . . ." The district court's decision and order were concerning Ada County's Motion for Summary Judgment. Idaho Rule of Civil Procedure 56 discusses Summary Judgment motions for claimants; therefore under I.R.C.P. 52(a), findings of fact are unnecessary and Gibson's argument fails.

B. GIBSON IS NOT ENTITLED TO RELIEF UNDER THE FLSA.

Gibson argues the district court erred when not allowing her to pursue claims for offset, credit or relief under the FLSA, when it granted summary judgment in favor of Ada County. This appeal concerns the decision of the district court's Memorandum Decision and Order Granting Plaintiff's Motion for Summary Judgment, filed in December 2004. That decision did not deal directly with Gibson's claim that she is entitled to relief under the FLSA for alleged violations of the Act. In fact, the district court granted Ada County's motion to dismiss Gibson's Second Amended Complaint in which she alleges she is entitled to relief under the FLSA. The district court stated in its order dated September 16, 2004:

> The Court has already ruled that Gibson cannot bring these claims. Even Gibson acknowledges that at a hearing on January 23, 2001, the Court stated: "The Court will not allow the defendant, or rather Ms. Gibson, to amend her complaint to allege a violation of the Fair Labor Standards Act based on the facts of this

> controversy, based on the Court's previous ruling that the Fair Labor Standards Act does not apply."

Gibson brings her FLSA argument on appeal by alleging she is entitled to a reduction in the amount granted under summary judgment due to Ada County's alleged violations of the Act. Gibson argues she is entitled to relief under 29 § U.S.C. 215 (a)(3), which states:

> [I]t shall be unlawful for any person . . . to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.

Gibson contends, "The effect of the County's overpayments was the sole basis used to terminate Gibson, as the County chose to shift their fault to Gibson for the erroneous wage and record-keeping processes used by Ada County and its Payroll Department." Gibson cites *Walling v. De Soto Creamery & Produce Co.*, 51 F.Supp. 938, 943 (D.C. Minn. 1943), which held:

> By failing to keep true records of the hours worked each work day and each workweek by each of its employees, and by making or causing to be made arbitrary, fictitious and false entries, purporting to reflect the hours worked each day and each workweek by each of its employees, the regular rate of pay, the regular straight time earnings, and the additional overtime earnings of many of its employees as above stated, the defendant has violated the . . . Act.

However, an overpayment of wages is not a violation of the FLSA. Gibson cites *Walling* to support her position that she is entitled to relief under the FLSA; however, that case does not support the contention that overpayment is a violation of the Act. In that case, the employer failed to keep true work records and pay overtime by using fictitious and false entries. *Walling* does not stand for the proposition that overpayment by an employer is a record-keeping violation that is actionable under the Act.

Ada County has always maintained that the overpayment was a result of a mistake on its part. It is uncertain why Gibson cites cases dealing with an employer's failure to keep records reflecting the hours worked by employees to support her position. The actions that led to her termination were her conduct in keeping the overpayments, which have yet to be returned to Ada County, and for failing to report the overpayments. This analysis precludes the necessity of addressing Ada County's additional arguments concerning why relief under the FLSA is inappropriate here.

This Court holds the district court's decision to not reduce the amount of relief due to Ada County for alleged violations of the FLSA was proper.

C. ADA COUNTY IS ENTITLED TO ATTORNEY FEES ON APPEAL.

An award of attorney fees pursuant to I.C. § 12-121 is appropriate when an appeal is brought or defended "frivolously, unreasonably or without foundation." *Risk v. Royal Caribean Cruises, Ltd.*, 141 Idaho 290, ___, 108 P.3d 990, 995 (2005) (citing *Lovelass v. Sword*, 140 Idaho 105, 109, 90 P.3d 330, 334 (2004). Gibson fails to properly address the

substance of the district court's memorandum decision and order granting Ada County's Motion for Summary Judgment. She again argues she is entitled to a reduction in the amount owed to Ada because of alleged violations of the FLSA; however the district court dismissed her amended complaint in which she alleged FLSA violations. She attempted to get around that dismissal by contending she is entitled to a reduction in the amount owed to Ada County under summary judgment. She relies on the same arguments she made at the district court level. When an appellant does not identify a finding of fact that is not supported by substantial and competent evidence, and the appellate court is simply asked to second-guess factual determinations and is not asked to establish new legal standards, nor modify or clarify existing standards, the appeal has been brought frivolously, unreasonably and without foundation. *Fairchild v. Fairchild*, 106 Idaho 147, 152, 676 P.2d 722, 727 (Ct. App. 1984). Here, Gibson fails to properly address the basis upon which the district court made its decision to grant summary judgment. She then asks this Court only to second-guess the district court's findings regarding reduction in the amount she owes Ada County. Attorney fees are awarded to Ada County.

IV.

CONCLUSION

Regarding *Gibson II*, dismissal of the 42 U.S.C. §§ 1981 and 1985(3) civil rights claims can be affirmed on other grounds not at issue on appeal; Gibson was not required to exhaust her administrative remedies; accrual of Gibson's 42 U.S.C. § 1983 claim occurred on February 15, 2000, following the hearing officer's decision; the district court did not err in finding the two-year statute of limitations had run on Gibson's

42 U.S.C. § 1983 civil rights claim; and Ada County is not entitled to an award of attorney fees on appea'

This Court affirms the district court's decisions to deny Gibson's Petition for Judicial Review and Motion to Remand and finds Gibson's request for a declaratory judgment is misplaced in *Gibson III*. Attorney fees are awarded to Ada County.

This Court affirms the district court's decision to grant summary judgment in favor of Ada County and awards attorney fees incurred on appeal to Ada County in *Gibson IV*.

Justices TROUT, EISMANN, BURDICK and JONES **CONCUR**.

APPENDIX 2 – ORDER OF THE IDAHO SUPREME COURT DENYING PETITION FOR REHEARING, FILED MAY 9, 2006

IN THE SUPREME COURT
OF THE STATE OF IDAHO

ORDER DENYING PETITION FOR REHEARING

No. 29694/30976/31553
Ref. No. 06RH-5

Filed: May 9, 2006

STACY A. GIBSON,

Plaintiff-Appellant,

v.

ADA COUNTY, a political subdivision of Idaho; ADA COUNTY SHERIFF'S OFFICE; VAUGHN KILLEEN, acting individually and in his official capacity under color of State Law as Ada County Sheriff; R. MONTE MACCONNELL, acting individually and in his official capacity under color of State Law as Legal Advisor to the Ada County Sheriff; ARVILLE GLENN, acting individually and in his official capacity under color of State Law as a law enforcement official for Ada County under the Sheriff; SCOTT JOHNSON, acting individually and in his official capacity under color of State Law as a law enforcement official for Ada County under the Sheriff; and DOES I thru X,

Defendants-Respondents.

The Appellant having filed a PETITION FOR REHEARING on March 2, 2006, and MEMORANDUM IN

Appendix 2

SUPPORT with attachments on April 26, 2006, of the Court's Opinion released February 9, 2006. The Court being fully advised; therefore, after due consideration,

IT IS HEREBY ORDERED that Appellant's PETITION FOR REHEARING be, and hereby is DENIED.

DATED this 9th day of May, 2006

For the Supreme Court

s/ Stephen Kenyon
Stephen Kenyon, Clerk

cc: Counsel of Record
West Publishing
Lexis/Nexis
Goller Publishing

APPENDIX 3 – ORDER OF THE IDAHO SUPREME COURT DENYING PETITION FOR WRIT OF CERTIORARI, FILED APRIL 25, 2006

IN THE SUPREME COURT
OF THE STATE OF IDAHO

ORDER DENYING PETITION
FOR WRIT OF CERTIORARI

No. 29694/30976/31553
Ref. No. 03S-338

Filed: April 25, 2006

STACY A. GIBSON,

Plaintiff-Appellant,

v.

ADA COUNTY, a political subdivision of Idaho; ADA COUNTY SHERIFF'S OFFICE; VAUGHN KILLEEN, acting individually and in his official capacity under color of State Law as Ada County Sheriff; R. MONTE MACCONNELL, acting individually and in his official capacity under color of State Law as Legal Advisor to the Ada County Sheriff; ARVILLE GLENN, acting individually and in his official capacity under color of State Law as a law enforcement official for Ada County under the Sheriff; SCOTT JOHNSON, acting individually and in his official capacity under color of State Law as a law enforcement official for Ada County under the Sheriff; and DOES I thru X,

Defendants-Respondents.

A PETITION FOR WRIT OF CERTIORARI and supporting MEMORANDUM were filed by counsel for

Appendix 3

Appellant March 22, 2006. The Court is fully advised; therefore, after due consideration,

IT IS HEREBY ORDERED that the PETITION FOR WRIT OF CERTIORARI be, and hereby is, DENIED.

DATED this 9th day of May, 2006

For the Supreme Court

s/ Stephen Kenyon
Stephen Kenyon, Clerk

cc: Counsel of Record
District Judge

APPENDIX 4 – MEMORANDUM IN SUPPORT OF VERIFIED PETITION FOR WRIT OF CERTIORARI, FILED MARCH 22, 2006

IN THE SUPREME COURT
OF THE STATE OF IDAHO

MEMORANDUM IN SUPPORT OF VERIFIED PETITION FOR WRIT OF CERTIORARI

Supreme Court Docket Nos. 29694, 30976 and 31553

Filed: March 22, 2006

STACY A. GIBSON,

Plaintiff-Appellant-Petitioner,

v.

ADA COUNTY, a political subdivision of Idaho; ADA COUNTY SHERIFF'S OFFICE; VAUGHN KILLEEN, acting individually and in his official capacity under color of State Law as Ada County Sheriff; R. MONTE MACCONNELL, acting individually and in his official capacity under color of State Law as Legal Advisor to the Ada County Sheriff; ARVILLE GLENN, acting individually and in his official capacity under color of State Law as a law enforcement official for Ada County under the Sheriff; SCOTT JOHNSON, acting individually and in his official capacity under color of State Law as a law enforcement official for Ada County under the Sheriff; and DOES I thru X,

Defendants-Respondents.

STACY A. GIBSON,

Petitioner-Appellant-Petitioner,

Appendix 4

v.

ADA COUNTY, a political subdivision and governmental agency of the State of Idaho, and the ADA COUNTY SHERIFF'S OFFICE,

Respondents.

I. INTRODUCTION

The Plaintiff-Petitioner-Appellant, Stacy A. Gibson [hereinafter Gibson], through counsel, Vernon K. Smith, and pursuant to Rules 3, 5 and 43, I.A.R., and § 7-201 *et seq.*, Idaho Code, has requested this Court grant Gibson's Petition for Writ of Certiorari and undertake to review the actions and conduct of Ada County, an inferior political subdivision and governmental agency of the State of Idaho, acting through its Board of Ada County Commissioners, Sheriff, Sheriff's Legal Advisor and Personnel Hearing Officer, who have acted in excess of their jurisdiction, or in the absence of constitutional judicial power[4] and authority, and for the Court to review records of the lower district courts and each of Gibson's four appeals (Docket Nos. 27605, 29694, 30976 and 31553), to determine, pursuant to applicable law:

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[4] In § 1-7B-1, Ada County Code, Ada County Personnel System, the Sheriff is defined as an elected official who has "administrative functions" only when hearing disciplinary appeals. Nowhere is it stated in the Ada County Personnel System that an elected official is vested or conferred with any constitutional judicial power or authority to finalize the termination of a classified County employee.

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1. Whether Ada County (Payroll Department and Sheriff's Office) was non-compliant with the mandatory provisions of the *Fair Labor Standards Act* (FLSA), § 211 (c), and exceeded or acted contrary to their jurisdiction, or acted in the absence of constitutional judicial power and authority, when they ignored and failed to keep and maintain proper and accurate wage and payroll records for Gibson;

2. Whether the Ada County Sheriff, Vaughn Killeen [hereinafter Sheriff), was non-complaint with FLSA and Federal law, and exceeded his jurisdiction, or acted in the absence of constitutional judicial power and authority, when he transferred the County's mandatory FLSA record-keeping obligations to Gibson;

3. Whether the Sheriff exceeded his jurisdiction, or acted in the absence of constitutional judicial power and authority, when he manufactured the claim of good cause to terminate Gibson's classified employment with the Sheriff's Office, when such good cause basis declared by the Sheriff and identified in the Ada County Personnel Manual, § 1-7G-3, Ada County Code (hereafter A.C.C.) do no comply with Idaho law under the void-for vagueness doctrine;

4. Whether the Sheriff exceeded his jurisdiction, or acted in the absence of constitutional judicial power and authority, when he declared Gibson's signature on incorrect pay vouchers created by the County Payroll Department, constituted a good cause basis to terminate Gibson's classified employment from the Ada County Sheriff's Office, when such good cause basis declared by the Sheriff and identified in the Ada County Personnel Manual, § 1-7G-3, A.C.C., do not comply with Idaho law under the void-for vagueness doctrine;

5. Whether the Sheriff exceeded his jurisdiction, or acted in the absence of constitutional judicial power and authority, when he declared Gibson's mistaken receipt of monies erroneously deposited by Ada County into the joint check account through the County's Direct Deposit Program, constituted good cause basis to terminate Gibson's classified employment from the Ada County Sheriff's Office, when such good cause basis declared by the Sheriff and identified in the Ada County Personnel Manual, § 1-7G-3, A.C.C., do not comply with Idaho law under the void-for vagueness doctrine, and was and caused solely from the County's incompetent system and inability to keep and maintain accurate payroll records required by the provisions of FLSA, § 211 (c);

6. Whether the Sheriff exceeded his jurisdiction, or acted in the absence of constitutional judicial power and authority, when he declared Gibson violated provisions of the Ada County Sheriff's Office Policy Manual, and constituted good cause basis to terminate Gibson's classified employment from the Ada County Sheriff's Office, when such good cause basis declared by the Sheriff and identified in the Ada County Personnel Manual, § 1-7G-3, A.C.C., do not comply with Idaho law under the void-for vagueness doctrine;

7. Whether the Sheriff exceeded his jurisdiction, or acted in the absence of constitutional judicial power and authority, when he refused to allow Gibson the opportunity of equal protection through the provisions of § 1-7C-6(B), A.C.C., and allow a reduction in her wages to address repayment to Ada County for any erroneous overpayments made by direct deposit to the joint checking account resulting from the County's failure to comply with FLSA record-keeping mandates, and where such conduct by the Sheriff is a substantial and material

breach of the covenants of good faith and fair dealing, under Idaho law;

8. Whether Ada County (through its Sheriff, Payroll Department, Human Resource Department or other Department), exceeded their jurisdiction, or acted in the absence of constitutional judicial power and authority, to deprive Gibson of her right and opportunity to engage in a *Loudermill* pre-termination hearing prior to providing Gibson official notification of intent to terminate, as identified in Gibson's "Notice of Personnel Action" on July 23, 1999 which stated: "Notice of Intent to Terminate";

9. Whether the Sheriff exceeded his jurisdiction, or acted in the absence of constitutional judicial power and authority, when he did on July 28, 1999, sign a directive with his affirmative intent to initiate termination proceedings against Gibson, prior to providing Gibson with any official notification of her right and opportunity to engage in a *Loudermill* pre-termination hearing;

10. Whether the Sheriff's Legal Advisor, R. Monte MacConnell, exceeded his jurisdiction, or acted in the absence of constitutional judicial power and authority, when he did make an extortious threat against Gibson on July 28, 1999, to the effect that if Gibson did not voluntarily resign her employment with the Sheriff's Office, she would be prosecuted for felony grand theft, all of which was done prior to providing Gibson with any official notification of her right and opportunity to engage in a *Loudermill* pre-termination hearing;

11. Whether the Sheriff exceeded his jurisdiction, or acted in the absence of constitutional judicial power and authority,

when he disregarded Gibson's constitutional right to procedural due process and a meaningful opportunity to participate in a pre-termination hearing as required by the U.S. Supreme Court in *Loudermill*, before he terminated her on December 27, 1999, of her;

12. Whether the Sheriff exceeded his jurisdiction, or acted in the absence of constitutional judicial power and authority, when he breached § 1-7G-3 F, A.C.C. of Gibson's employment contract with Ada County, and placed her on administrative leave, without pay, on August 25, 1999, when the established policy and rules of the Ada County Personnel System required the Sheriff to place Gibson on administrative leave, with pay, only, until such time Gibson had appealed the decision of the Sheriff (January 4, 2000), and, after the Sheriff had issued any written decision (December 27, 1999) concerning the disciplinary action he was imposing upon Gibson;

13. Whether the Ada County Personnel Hearing Officer, G. Lance Salladay, acting and compensated through his two year appointment by the Ada County Board of Commissioners, exceeded his jurisdiction, or acted in the absence of constitutional judicial power and authority, when he denied Gibson access to the requested information and exculpatory evidence concerning those matters affecting her FLSA wages, compensation, benefits, and the County FLSA record-keeping violations, which had caused the direct deposit overpayments into Gibson's joint checking account, when Gibson was entitled to such evidence in her defense against the charges made against her by the Sheriff during the non-agency hearing held on January 25th and January 26th, 2000;

14. Whether the 4th District Court Judge, Honorable Ronald Wilper, failed to exercise his judicial authority, or acted in the

absence of proper exercise of his constitutional judicial power and authority, when he denied Gibson her vested statutory right under FLSA to engage Ada County Defendants with a "right of action" for the purpose of vindicating legal and equitable relief under FLSA, for wages Ada County owes her under the provisions of her employment contract;

15. Whether the 4th District Court Judge, Honorable Ronald Wilper, failed to exercise his judicial authority, or acted in the absence of proper exercise of his constitutional judicial power and authority, when he denied Gibson her vested statutory right under Title 42, § 1983, to employ equitable tolling and allow Gibson to engage Ada County Defendants with a "right of action" for the purpose of vindicating legal and equitable relief under Title 42;

16. Whether the 4th District Court Judge, Honorable D. Duff McKee, failed to exercise his judicial authority, or acted in the absence of proper exercise of his constitutional judicial power and authority, when he denied Gibson any access to judicial review of the County's claim the termination of Gibson by an elected official was final[5], and not considering

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[5] On March 21, 2006, the Board of Ada County Commissioners held a public hearing to take under advisement its intent to enact Ordinance No. 612, which will alter, modify, and amend § 1-7G-3 of the Ada County Personnel System, and as a consequence thereof, permanently deprive and dispossess all classified Ada County employees of their constitutional right to participate in an administrative agency review hearing, the right to a definitive and final order from the administrative agency, and the right to access the courts for judicial review of their property rights and interests of their tenured employment status. The County has designed Ordinance No. 612 in such a manner as to reduce due process protection of County employees, and allows the disciplinary and termination decisions of an elected County official to become final, without allowing classified employee the right of administrative agency review, the right to a final and

the sufficiency of Gibson's pleadings (Petition for Judicial Review, dated July 30, 2003), to be sufficient to constitute a Petition for Writ of Review (Certiorari), to review the record of Gibson's termination, and the County's denial of Gibson's constitutional right to due process, including the right to an administrative agency review hearing, the right to a final and definitive administrative agency order, and the right to access the courts for judicial review;

17. Whether the acts undertaken by the Ada County Commissioners, the Ada County Personnel Hearing Officer, the Ada County Sheriff, and the Sheriff's Legal Advisor, exceeded their jurisdiction, or acted in the absence of constitutional judicial power and authority, when these acts caused Gibson to be deprived of a vested property right in her employment, without ever being provided constitutional procedural due process, as required by Federal law; and,

18. Whether the acts undertaken by the Ada County Commissioners, the Ada County Personnel Hearing Officer, the Ada County Sheriff, and the Sheriff's Legal Advisor, exceeded their jurisdiction, or acted in the absence of constitutional judicial power and authority, when they denied Gibson her the right of constitutional due process, contrary to well established Federal and Idaho merit system law as was declared in Hansen v. White, 114 Idaho 907, 762 P.2d 820 (1988) and Hansen v. White, 947 F.2d 1378 (9th Cir. 1991).

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definitive administrative agency ord[illegible] and the right to access a court for judicial review of the discipline or [illegible]mination imposed. See Exhibit 2, attached hereto. This conduct will serve to invite future litigation.

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II. SUMMARIZED STATEMENTS OF FACTS AND ISSUES

For Summarized Statement of Facts and Issues concerning Supreme Court Docket Nos. 27605, 29694, 30976 and 31553, see pages 4-17 of Gibson's Memorandum in Support of her Petition for Rehearing, submitted contemporaneously herewith.

III. ARGUMENT

In the matter of IWP v. State Bd. of Land Comrs., 133 Idaho 55, 982 P.2d 358 (1999), this Idaho Supreme Court stated:

> "This Court has original jurisdiction, pursuant to Article 5, § 9 of the Idaho Constitution, "to issue writs of mandamus, certiorari, prohibition, and habeas corpus, and all writs necessary or proper to the complete exercise of its appellate jurisdiction." Idaho Const. art. V, § 9. We will exercise jurisdiction to review a petition for extraordinary relief where the petition alleges sufficient facts concerning a possible constitutional violation of an urgent nature. *See Nez Perce Tribe v. Cenarrusa*, 125 Idaho 37, 38, 867 P.2d 911, 912 (1993) (citing *Sweeney v. Otter*, 119 Idaho 135, 138, 804 P.2d 308, 311 (1990)); *see also Balderston v. Brady*, 17 Idaho 567, 107 P. 493 (1910). (Emphasis added).

That in accordance with Idaho State law, a writ of review is defined as, "[a] general form of process issuing from an appellate court to bring up for review the record of the proceedings in the court below; the common-law writ of certiorari." BLACK'S LAW DICTIONARY 1605 (7th ed.

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1999. "A writ of review may be granted . . . when an inferior tribunal, board or officer exercising judicial functions, has exceeded the jurisdiction of such tribunal, board or officer, and there is not appeal, nor, in the judgment of the court, any plain, speedy and adequate remedy", as addressed in Union Pac. Land Res. V. Shoshone Assessor, 140 Idaho 528, 532, 96 P.3d 629 (2004).

That a writ of review cannot be extended further than to determine whether an inferior tribunal, board or officer has pursued its authority or has exceeded its jurisdiction, and it is equally well-established that the question of jurisdiction is to be determined by the terms of the statute, and that the question of constitutionality of the statute cannot be reviewed on certiorari, as identified in Weiser National Bank v. Washington County, 30 Idaho 332, 164 P 1014 (1917); see also § 7-202, Idaho Code.

Gibson's Verified Petition for Certiorari is commensurate with two recent decisions of the Federal District Courts, and bear striking resemblance to the issues as exist here, where Gibson has been denied any right to judicial review of her employment termination. See McNulty v. Sandoval County, No. CIV 05-221 BB/ACT, United States District Court, D. New Mexico, August 15, 2005, and in Terlecky v. City of Ruidoso Downs, No. CIV 04-1121 BB DJS, United States District Court, D. New Mexico, January 24, 2006, where the state statutes did allow a governmental agency's employee the right of direct appeal to the district court. That Federal Court stated:

> "Plaintiff had a remedy available in district court, by way of writ of certiorari, even if there is no statutory authorization for the direct

> appeal allowed by the City's personnel manual"; and,
>
> "The personnel manual allows an appeal to state district court from decisions of the City Council, although there does not appear to be statutory authorization for such an appeal in the applicable New Mexico statutes"; and,
>
> "It is true that Plaintiff had a remedy available in district court, by way of writ of certiorari, even if there is no statutory authorization for the direct appeal allowed by the City's personnel manual. *See Zamora v. Village of Ruidoso Down*, 907 P.2d 182, 184 (N.M. 1995) (unless otherwise provided by statute, correct procedure to appeal from administrative employment decision is to petition district court for writ of certiorari)". (Emphasis added).

The District Judge who presided over the *Terlecky* case, the Honorable Bruce Black, exercised his judicial authority and power to promote the interest of justice, and upon his own motion, declared plaintiff's lawsuit pleadings sufficient enough to construe them as a petition for writ of certiorari, thereby causing the failure of any argument made by the defendants that plaintiff had not exercised a right to judicial review. See also Zamora v. Ruidoso Downs, 120 N.M. 778, 907 P.2d 182 (1995), where the New Mexico Supreme Court stated:

> "Unless otherwise provided by statute, the correct procedure to appeal a personnel board's administrative decision is to petition the district court for a writ of certiorari".

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Of interest, if state courts, when asked, refuse to make available an adequate remedy for this type of procedural due process deprivation, a Federal court will then determine whether the 14th Amendment Due Process Clause requires such a remedy, and if it does, the Federal court will remedy the violation. See Hicks v. Jackson County Commission, Civil Action No. CV-03-S-2858-NE, United States District Court, N.D. Alabama, Northeastern Division, June 23, 2005; McKinney v. Pate, 20 F.3d 1550 (11th Cir. 1994).

In Moreland v. Miami-Dade County, 255 F. Supp.2d 1304 (2002), the Federal court stated:

> "In *McKinney v. Pate*, the Eleventh Circuit reiterated that "a procedural due process violation is not complete `unless and until the [s]tate fails to provide due process.'" *McKinney v.Pate*, 20 F.3d 1550, 1557 (11th Cir. 1994) (quoting *Zinermon v.Burch*, 494 U.S. 113, 126, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990)). "[O]nly when the state refuses to provide a process sufficient to remedy the procedural deprivation does a constitutional violation actionable under section 1983 arise." *Id*".

See also Horton v. Bd. Cnty. Com'rs, Flager Cnty, 202 F.3d 1297 (11th Cir. 2000).

Up to this point in time, Ada County and the Idaho state courts have not provided Gibson with an adequate remedy for the deprivation of her property rights under the Due Process Clause of the 14th Amendment. Faced with an inferior governmental administrative agency, acting under color of state law that has deprived Gibson of the procedural guarantee

protected by the 14th Amendment, and the lack of an adequate state remedy, the Federal court would have jurisdiction and authority to proceed with the adjudication of Federal due process claims. See Horton v. Bd. Cnty. Com'rs, Flager Cnty, *supra.*

IV. CONCLUSION

Gibson requests this Court provide her the relief as prayed for in her Verified Petition for Certiorari.

Respectfully Submitted This 22nd day of March 2006.

s/ *Vernon K. Smith*
Vernon K. Smith
Attorney for Plaintiff-Appellant-Petitioner

APPENDIX 5 – VERIFIED PETITION FOR WRIT OF CERTIORARI, FILED MARCH 22, 2006

IN THE SUPREME COURT
OF THE STATE OF IDAHO

VERIFIED PETITION FOR WRIT OF CERTIORARI

Supreme Court Docket Nos. 29694, 30976 and 31553

Filed: March 22, 2006

STACY A. GIBSON,

Plaintiff-Appellant-Petitioner,

v.

ADA COUNTY, a political subdivision of Idaho; ADA COUNTY SHERIFF'S OFFICE; VAUGHN KILLEEN, acting individually and in his official capacity under color of State Law as Ada County Sheriff; R. MONTE MACCONNELL, acting individually and in his official capacity under color of State Law as Legal Advisor to the Ada County Sheriff; ARVILLE GLENN, acting individually and in his official capacity under color of State Law as a law enforcement official for Ada County under the Sheriff; SCOTT JOHNSON, acting individually and in his official capacity under color of State Law as a law enforcement official for Ada County under the Sheriff; and DOES I thru X,

Defendants-Respondents.

STACY A. GIBSON,

Petitioner-Appellant-Petitioner,

v.

Appendix 5

ADA COUNTY, a political subdivision and governmental agency of the State of Idaho, and the ADA COUNTY SHERIFF'S OFFICE,

Respondents.

COMES NOW The Plaintiff-Petitioner-Appellant, Stacy A. Gibson [hereinafter Gibson], through counsel, Vernon K. Smith, and pursuant to Rules 3, 5 and 43, I.A.R., and § 7-201 *et seq.*, Idaho Code, does request this Court grant Gibson's Petition for Writ of Certiorari and undertake to review the actions and conduct of Ada County, an inferior political subdivision and governmental agency of the State of Idaho, acting through its Board of Ada County Commissioners, Sheriff, Sheriff's Legal Advisor and Personnel Hearing Officer, in excess of or contrary to their jurisdiction, or in the absence of constitutional judicial power and authority, by reviewing records of the lower district courts and in each of Gibson's four appeals (Docket Nos. 27605, 29694, 30976 and 31553), to determine, pursuant to applicable law:

1. Whether Ada County (Payroll Department and Sheriff's Office) was non-compliant with the mandatory provisions of the *Fair Labor Standards Act* (FLSA), § 211 (c), and exceeded or acted contrary to their jurisdiction, or acted in the absence of constitutional judicial power and authority, when they ignored and failed to keep and maintain proper and accurate wage and payroll records for Gibson;

2. Whether the Ada County Sheriff, Vaughn Killeen [hereinafter Sheriff), was non-complaint with FLSA and Federal law, and exceeded his jurisdiction, or acted in the absence of constitutional judicial power and authority, when he

transferred the County's mandatory FLSA record-keeping obligations to Gibson;

3. Whether the Sheriff exceeded his jurisdiction, or acted in the absence of constitutional judicial power and authority, when he manufactured the claim of good cause to terminate Gibson's classified employment with the Sheriff's Office, when such good cause basis declared by the Sheriff and identified in the Ada County Personnel Manual, § 1-7G-3, Ada County Code (hereafter A.C.C.) do no comply with Idaho law under the void-for vagueness doctrine;

4. Whether the Sheriff exceeded his jurisdiction, or acted in the absence of constitutional judicial power and authority, when he declared Gibson's signature on incorrect pay vouchers created by the County Payroll Department, constituted a good cause basis to terminate Gibson's classified employment from the Ada County Sheriff's Office, when such good cause basis declared by the Sheriff and identified in the Ada County Personnel Manual, § 1-7G-3, A.C.C., do not comply with Idaho law under the void-for vagueness doctrine;

5. Whether the Sheriff exceeded his jurisdiction, or acted in the absence of constitutional judicial power and authority, when he declared Gibson's mistaken receipt of monies erroneously deposited by Ada County into the joint check account through the County's Direct Deposit Program, constituted good cause basis to terminate Gibson's classified employment from the Ada County Sheriff's Office, when such good cause basis declared by the Sheriff and identified in the Ada County Personnel Manual, § 1-7G-3, A.C.C., do not comply with Idaho law under the void-for vagueness doctrine, and was and caused solely from the County's incompetent

system and inability to keep and maintain accurate payroll records required by the provisions of FLSA, § 211 (c);

6. Whether the Sheriff exceeded his jurisdiction, or acted in the absence of constitutional judicial power and authority, when he declared Gibson violated provisions of the Ada County Sheriff's Office Policy Manual, and constituted good cause basis to terminate Gibson's classified employment from the Ada County Sheriff's Office, when such good cause basis declared by the Sheriff and identified in the Ada County Personnel Manual, § 1-7G-3, A.C.C., do not comply with Idaho law under the void-for vagueness doctrine;

7. Whether the Sheriff exceeded his jurisdiction, or acted in the absence of constitutional judicial power and authority, when he refused to allow Gibson the opportunity of equal protection through the provisions of § 1-7C-6(B), A.C.C., and allow a reduction in her wages to address repayment to Ada County for any erroneous overpayments made by direct deposit to the joint checking account resulting from the County's failure to comply with FLSA record-keeping mandates, and where such conduct by the Sheriff is a substantial and material breach of the covenants of good faith and fair dealing, under Idaho law;

8. Whether Ada County (through its Sheriff, Payroll Department, Human Resource Department or other Department), exceeded their jurisdiction, or acted in the absence of constitutional judicial power and authority, to deprive Gibson of her right and opportunity to engage in a *Loudermill* pre-termination hearing prior to providing Gibson official notification of intent to terminate, as identified in Gibson's "Notice of Personnel Action" on July 23, 1999 which stated: "Notice of Intent to Terminate";

9. Whether the Sheriff exceeded his jurisdiction, or acted in the absence of constitutional judicial power and authority, when he did on July 28, 1999, sign a directive with his affirmative intent to initiate termination proceedings against Gibson, prior to providing Gibson with any official notification of her right and opportunity to engage in a *Loudermill* pre-termination hearing;

10. Whether the Sheriff's Legal Advisor, R. Monte MacConnell, exceeded his jurisdiction, or acted in the absence of constitutional judicial power and authority, when he did make an extortious threat against Gibson on July 28, 1999, to the effect that if Gibson did not voluntarily resign her employment with the Sheriff's Office, she would be prosecuted for felony grand theft, all of which was done prior to providing Gibson with any official notification of her right and opportunity to engage in a *Loudermill* pre-termination hearing;

11. Whether the Sheriff exceeded his jurisdiction, or acted in the absence of constitutional judicial power and authority, when he disregarded Gibson's constitutional right to procedural due process and a meaningful opportunity to participate in a pre-termination hearing as required by the U.S. Supreme Court in *Loudermill*, before he terminated her on December 27, 1999, of her;

12. Whether the Sheriff exceeded his jurisdiction, or acted in the absence of constitutional judicial power and authority, when he breached § 1-7G-3 F, A.C.C. of Gibson's employment contract with Ada County, and placed her on administrative leave, without pay, on August 25, 1999, when the established policy and rules of the Ada County Personnel System required the Sheriff to place Gibson on administrative leave, with pay,

only, until such time Gibson had appealed the decision of the Sheriff (January 4, 2000), and, after the Sheriff had issued any written decision (December 27, 1999) concerning the disciplinary action he was imposing upon Gibson;

13. Whether the Ada County Personnel Hearing Officer, G. Lance Salladay, acting and compensated through his two year appointment by the Ada County Board of Commissioners, exceeded his jurisdiction, or acted in the absence of constitutional judicial power and authority, when he denied Gibson access to the requested information and exculpatory evidence concerning those matters affecting her FLSA wages, compensation, benefits, and the County FLSA record-keeping violations, which had caused the direct deposit overpayments into Gibson's joint checking account, when Gibson was entitled to such evidence in her defense against the charges made against her by the Sheriff during the non-agency hearing held on January 25th and January 26th, 2000;

14. Whether the 4th District Court Judge, Honorable Ronald Wilper, failed to exercise his judicial authority, or acted in the absence of proper exercise of his constitutional judicial power and authority, when he denied Gibson her vested statutory right under FLSA to engage Ada County Defendants with a "right of action" for the purpose of vindicating legal and equitable relief under FLSA, for wages Ada County owes her under the provisions of her employment contract;

15. Whether the 4th District Court Judge, Honorable Ronald Wilper, failed to exercise his judicial authority, or acted in the absence of proper exercise of his constitutional judicial power and authority, when he denied Gibson her vested statutory right under Title 42, § 1983, to employ equitable tolling and allow Gibson to engage Ada County Defendants with a "right of

action" for the purpose of vindicating legal and equitable relief under Title 42;

16. Whether the 4th District Court Judge, Honorable D. Duff McKee, failed to exercise his judicial authority, or acted in the absence of proper exercise of his constitutional judicial power and authority, when he denied Gibson any access to judicial review of the County's claim the termination of Gibson by an elected official was final, and not considering the sufficiency of Gibson's pleadings (Petition for Judicial Review, dated July 30, 2003), to be sufficient to constitute a Petition for Writ of Review (Certiorari), to review the record of Gibson's termination, and the County's denial of Gibson's constitutional right to due process, including the right to an administrative agency review hearing, the right to a final and definitive administrative agency order, and the right to access the courts for judicial review;

17. Whether the acts undertaken by the Ada County Commissioners, the Ada County Personnel Hearing Officer, the Ada County Sheriff, and the Sheriff's Legal Advisor, exceeded their jurisdiction, or acted in the absence of constitutional judicial power and authority, when these acts caused Gibson to be deprived of a vested property right in her employment, without ever being provided constitutional procedural due process, as required by Federal law; and,

18. Whether the acts undertaken by the Ada County Commissioners, the Ada County Personnel Hearing Officer, the Ada County Sheriff, and the Sheriff's Legal Advisor, exceeded their jurisdiction, or acted in the absence of constitutional judicial power and authority, when they denied Gibson her the right of constitutional due process, contrary to

well established Federal and Idaho merit system law as was declared in Hansen v. White, 114 Idaho 907, 762 P.2d 820 (1988) and Hansen v. White, 947 F.2d 1378 (9th Cir. 1991).

I. IDENTIFICATION OF PARTIES AND CAPACITIES

Stacy A. Gibson, at all times mentioned herein, was a citizen of the United States of America, a resident of Ada County, Idaho, engaged as a classified, protected and tenured status employee with the Ada County Sheriff's Office, as vested, defined by, promulgated, enacted and enforced through the terms and conditions of the Ada County Personnel System, § 1-7-1 through § 1-7L-10, A.C.C.

That Ada County is an inferior political subdivision of the State of Idaho, and a statutorily authorized government agency; that the Ada County Board of Commissioners are the elected public officials of said governmental agency; that the Ada County Sheriff's Office is a Department within this inferior political subdivision and governmental agency of said Ada County.

That Defendant, Ada County Board of Commissioners, is the Board of said inferior governmental agency, authorized by the Idaho Constitution under Article XVIII, § 5, §6, §7, §10 and §11 and State law, and at the time the events were occurring as alleged herein, said Board was acting in its official administrative agency capacity under color of State law, as the Ada County Board of County Commissioners.

That Defendant, Ada County Sheriff's Office, is a Department within said inferior political subdivision of Ada County; that Vaughn Killeen was the Ada County Sheriff at all

times alleged herein, and was engaged in that elected official capacity, under color of State law.

II. JURISDICTION, VENUE AND LIMITATIONS OF WRIT OF REVIEW

That the Idaho Supreme Court has original jurisdiction over this subject matter, and is the proper venue of this action, pursuant to and in accordance with Article V, § 9 of the Idaho Constitution, Title 7, Chapter 2, Statutes of the State of Idaho, and § 1-203, Idaho Code.

That a writ of review cannot be extended further than to determine whether an inferior tribunal, board or officer has regularly pursued its authority or has exceeded its jurisdiction, and it is equally well-established that the question of jurisdiction is to be determined by the terms of the statute, and that the question of constitutionality of the statute cannot be reviewed on certiorari. See Weiser National Bank v. Washington County, 30 Idaho 332, 164 P 1014 (1917); see also § 7-202, Idaho Code.

III. SUMMARIZED STATEMENTS OF FACTS AND ISSUES

For a Summarized Statement of Facts and Issues concerning Supreme Court Docket Nos. 27605, 29694, 30976 and 31553, see pages 4-17 of Gibson's Memorandum in Support of her Petition for Rehearing, submitted contemporaneously herewith.

IV. MEMORANDUM IN SUPPORT OF PETITION FOR CERTIORARI.

Appendix 5

Gibson's Memorandum in Support of this Verified Petition for Writ of Certiorari is contemporaneously submitted herewith.

V. PRAYER AND REQUEST FOR RELIEF

WHEREFORE, Plaintiff-Petitioner-Appellant, Stacy A. Gibson, does pray for relief as follows:

1. That the Court determine no plain, speedy or adequate remedy has been forthcoming from any Idaho court in this dispute.

2. That this Court take the appropriate judicial action, pursuant to applicable law, to review the actions and conduct of Ada County, an inferior political subdivision and governmental agency of the State of Idaho, acting through its Board of Ada County Commissioners, Sheriff, Sheriff's Legal Advisor and Personnel Hearing Officer, and vacate any meaning or effect of the "recommendatory" decision of the Ada County Hearing Officer issued February 15, 2000, as that decision is a non-agency event; vacate any meaning or effect of the proposed termination forthcoming from Sheriff Killeen, as it was not a final order of the Board (administrative agency); and enter an order confirming the full reinstatement of Gibson's employment with the Ada County Sheriff's Office, with rank, seniority, benefits, privileges, entitlements and back pay, retroactive to August 25, 1999, when Gibson was placed on administrative leave, without pay, and departmentally disciplined with termination by the Sheriff on December 27, 1999.

3. For such other and further relief as this Court may deem just and proper in the premises.

Appendix 5

Respectfully Submitted This 22nd day of March 2006.

s/ Vernon K. Smith
Vernon K. Smith
Attorney for Plaintiff-Appellant-Petitioner

VERIFICATION OF PETITION FOR WRIT OF CERTIORARI

I, Stacy A. Gibson, a citizen of the United States and resident of the State of Idaho, do hereby declare I have read the above and foregoing Verified Petition for Writ of Certiorari and the factual allegations therein, and that the facts alleged are true and correct to the best of my knowledge and belief.

s/ Stacy A. Gibson
Stacy A. Gibson
Plaintiff-Appellant-Petitioner

SUBSCRIBED AND SWORN TO BEFORE ME, this 22nd day of March 2006.

s/ Vernon K. Smith
Notary Public for Idaho
Residing at Boise, Idaho
Commission Expires: 12/20/06

APPENDIX 6 – REMITTITUR FROM THE IDAHO SUPREME COURT TO THE FOURTH JUDICIAL DISTRICT, COUNTY OF ADA, FILED MAY 9, 2006

IN THE SUPREME COURT
OF THE STATE OF IDAHO

REMITTITUR

No. 29694/30976/31553

STACY A. GIBSON[6],

Plaintiff-Appellant,

v.

ADA COUNTY, a political subdivision of Idaho; ADA COUNTY SHERIFF'S OFFICE; VAUGHN KILLEEN, acting individually and in his official capacity under color of State Law as Ada County Sheriff; R. MONTE MACCONNELL, acting individually and in his official capacity under color of State Law as Legal Advisor to the Ada County Sheriff; ARVILLE GLENN, acting individually and in his official capacity under color of State Law as a law enforcement official for Ada County under the Sheriff; SCOTT JOHNSON, acting individually and in his official capacity under color of State Law as a law enforcement official for Ada County under the Sheriff; and DOES I thru X,

Defendants-Respondents.

STACY A. GIBSON[7],

Plaintiff-Appellant,

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[6] Idaho Supreme Court Docket No. 29694
[7] Idaho Supreme Court Docket No. 30976

Appendix 6

v.

ADA COUNTY, a political subdivision and governmental agency of the State of Idaho, and the ADA COUNTY SHERIFF'S OFFICE,

Defendants-Respondents.

ADA COUNTY[8],

Plaintiff-Respondent,

v.

STACY A. GIBSON,

Defendant-Appellant.

TO: FOURTH JUDICIAL DISTRICT, COUNTY OF ADA

The Court having announced its Opinion in this cause February 9, 2006, and having denied appellant's Petition for Rehearing on May 9, 2006; therefore,

IT IS HEREBY ORDERED that the Opinion of the Court announced February 9, 2006, be, and hereby is, FINAL; and

IT IS FURTHER HEREBY ORDERED THAT costs and attorney fees, if any, will be awarded to respondents in a subsequent order.

DATED this 9th day of May, 2006.

[8] Idaho Supreme Court Docket No. 31553. This listing of parties was absent from Opinion No. 10 released by the Idaho Supreme Court on February 9, 2006.

Appendix 6

s/ Stephen Kenyon
Clerk of the Supreme Court
STATE OF IDAHO

cc: Counsel of Record
District Court Clerk
District Judge

APPENDIX 7 – ORDER OF THE IDAHO SUPREME COURT AWARDING COSTS AND FEES, FILED MAY 12, 2006

IN THE SUPREME COURT
OF THE STATE OF IDAHO

ORDER AWARDING COSTS AND ATTORNEY FEES

NO. 29694/30976/31553

Ref. No. 03S-338

Filed: May 12, 2006

STACY A. GIBSON,

Plaintiff-Appellant,

v.

ADA COUNTY, a political subdivision of Idaho; ADA COUNTY SHERIFF'S OFFICE; VAUGHN KILLEEN, acting individually and in his official capacity under color of State Law as Ada County Sheriff; R. MONTE MACCONNELL, acting individually and in his official capacity under color of State Law as Legal Advisor to the Ada County Sheriff; ARVILLE GLENN, acting individually and in his official capacity under color of State Law as a law enforcement official for Ada County under the Sheriff; SCOTT JOHNSON, acting individually and in his official capacity under color of State Law as a law enforcement official for Ada County under the Sheriff; and DOES I thru X,

Defendants-Respondents.

A MEMORANDUM OF COSTS AND ATTORNEY FEES was filed by counsel for Respondents February 23, 2006.

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An OBJECTION TO MEMORANDUM OF COSTS AND FEES was filed by counsel for Appellant March 8, 2006. A REPLY TO OBJECTION TO MEMORANDUM OF COSTS AND FEES was filed by counsel for Respondents March 15, 2006. The Court being fully advised; therefore, after due consideration,

IT IS HEREBY ORDERED that Respondents' MEMORANDUM OF COSTS AND ATTORNEY FEES be, and hereby are, GRANTED and costs and attorney fees are awarded to Respondents and against Appellant as follows:

Costs:	$ 552.00
Attorney Fees:	$13,275.52
TOTAL	$13,827.52

DATED this 12th day of May, 2006.

By Order of the Supreme Court

s/ Stephen Kenyon
Stephen W. Kenyon, Clerk

cc: Counsel of Record

APPENDIX 8 – ORDER FOR JUDGMENT ENTERED BY JUDGE RONALD J. WILPER, FOURTH DISTRICT COURT (DOCKET NO. 31553), FILED MAY 25, 2006

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Case No. CV OC 0107394D

ORDER FOR JUDGMENT

Filed: May 25, 2006

ADA COUNTY,

Plaintiff,

v.

STACY A. GIBSON,

Defendant.

IT APPEARING from the records of the above-entitled case that Plaintiff is entitled to attorney fees and costs, **IT IS HEREBY ORDERED** that Judgment be entered against Defendant and for Plaintiff in the amount of $7,143.97.

DATED this 19th day of May, 2006.

s/ Ronald J. Wilper
Ronald J. Wilper, District Judge

APPENDIX 9 – JUDGMENT FOR COSTS ENTERED BY JUDGE RONALD J. WILPER, FOURTH DISTRICT COURT (DOCKET NO. 29694), FILED MAY 25, 2006

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Case No. CV OC 0205601D

JUDGMENT FOR COSTS

Filed: May 25, 2006

STACY A. GIBSON,

Plaintiff,

v.

ADA COUNTY, et al.;

Defendants.

The Court, having considered the Defendants' Motion for Order and Judgment for Costs, and the Court having issued the Order for Judgment, hereby concludes as follows:

Defendants are entitled to its costs of $186.00 on appeal

DATED this 24th day of May, 2006.

s/ Ronald J. Wilper
Ronald J. Wilper
District Judge

APPENDIX 10 – JUDGMENT FOR FEES AND COSTS ENTERED BY JUDGE RONALD J. WILPER, FOURTH DISTRICT COURT (DOCKET NO. 31553), FILED MAY 19, 2006

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Case No. CV OC 0107394D

JUDGMENT FOR FEES AND COSTS

Filed: May 19, 2006

ADA COUNTY,

Plaintiff,

v.

STACY A. GIBSON,

Defendant.

The Court, having considered the Plaintiff's Motion for Order and Judgment for Fees and Costs, and the Court having issued the Order for Judgment, hereby concludes as follows:

Plaintiff is awarded its fees and costs of $7,143.97 on appeal.

DATED this 19th day of May, 2006.

s/ Ronald J. Wilper
Ronald J. Wilper, District Judge

APPENDIX 11 – ORDER FOR JUDGMENT ENTERED BY JUDGE RONALD J. WILPER, FOURTH DISTRICT COURT (DOCKET NO. 29694), FILED MAY 19, 2006

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Case No. CV OC 0205601D

ORDER FOR JUDGMENT

Filed: May 19, 2006

STACY A. GIBSON,

Plaintiff,

v.

ADA COUNTY, et al.;

Defendants.

IT APPEARING from the records of the above-entitled case that Defendants are entitled to costs, **IT IS HEREBY ORDERED** that Judgment be entered against Plaintiff in the amount of $186.00.

DATED this 19th day of May, 2006.

s/ Ronald J. Wilper
Ronald J. Wilper
District Judge

APPENDIX 12 – ORDER FOR JUDGMENT ENTERED BY JUDGE JOEL HORTON, FOURTH DISTRICT COURT (DOCKET NO. 30976), FILED MAY 19, 2006

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Case No. CV OC 0305850D

ORDER FOR JUDGMENT

Filed: May 19, 2006

STACY A. GIBSON,

Petitioner,

v.

ADA COUNTY, a political subdivision and governmental agency of the State of Idaho AND THE ADA COUNTY SHERIFF'S OFFICE,

Respondents.

IT APPEARING from the records of the above-entitled case that Respondents are entitled to attorney fees and costs, **IT IS HEREBY ORDERED** that Judgment be entered against Petitioner in the amount of $6,497.55.

ORDERED this 19th day of May, 2006.

s/ Joel Horton
Joel Horton, District Judge

APPENDIX 13 – JUDGMENT FOR COSTS AND FEES ENTERED BY JUDGE JOEL HORTON, FOURTH DISTRICT COURT (DOCKET NO. 30976), FILED MAY 19, 2006 -

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Case No. CV OC 0305850D

JUDGMENT FOR FEES AND COSTS

Filed: May 19, 2006

STACY A. GIBSON,

Petitioner,

v.

ADA COUNTY, a political subdivision and governmental agency of the State of Idaho AND THE ADA COUNTY SHERIFF'S OFFICE,

Respondents.

The Court, having considered the Respondents' Motion for Order and Judgment for Costs, and the Court having issued the Order for Judgment, hereby concludes as follows:

Respondents are entitled to its fees and costs of $6,497.55 on appeal.

ORDERED this 19th day of May, 2006.

s/ Joel Horton
Joel Horton, District Judge

APPENDIX 14 – MEDICAL RECORDS OF F. LAMARR HEYREND, M.D. DATED JUNE 23, 2005, VERIFYING GIBSON SUFFERS PSYCHOLOGICAL WORKPLACE INJURY (PTSD DIAGNOSIS) CAUSED BY ADA COUNTY'S MISCONDUCT

June 23, 2005

Patient: Stacy A. Gibson
DOB: August 30, 1958

PATIENT HISTORY:

I initially examined Ms. Gibson on October 16, 2002. Ms. Gibson's husband, John Gibson, referred Ms. Gibson to me as a patient after he had consulted with Dr. Stephen E. Spencer, M.D. Ms. Gibson was experiencing extreme emotional and mental disturbances, and resulting physical injuries she claimed to have initially experienced and first began to suffer since July 20, 1999 and progressing thereafter, as a result of her psychological workplace injury. I immediately placed Ms. Gibson in an outpatient psychiatric treatment program through my office, and Ms. Gibson has been receiving outpatient medical care from me since October 2002 to the present date. She originally received medical care from Dr. Spencer on July 23, 1999 for this psychological workplace injury, which she described had occurred on June 20, 1999 and continued thereafter. The historic facts and events that caused Ms. Gibson's injuries have been described to me as follows:

> In early 1997, Ms. Gibson wanted a career with law enforcement, and on July 10, 1997, became employed as a Records Technician with the Sheriff's Office,

located at the Boise State University (PSU) Substation. Ms. Gibson was employed there as a non-commissioned officer (no arrest powers) to October 15, 1998, when she was promoted and transferred to the main Jail Facility as a Jail Technician. At the time of Ms. Gibson's transfer, her gross wages were $1,500.00 a month, and the County Payroll Department had been directly depositing her wages into a joint checking account she had with her husband.

Sometime after Ms. Gibson's transfer to the Jail Facility, and before November 1, 1998, the Ada County Payroll Department created errors in Ms. Gibson's wages. Instead of paying Ms. Gibson the wage due her at $1,575.00 a month, in light of the increase from her promotion, the Payroll Department calculated wages incorrectly by combining her old wage of $1,500.00 with a new wage figure of $1,550.00, creating an erroneous wage of $3,050.00, and that incorrect figure was then directly deposited each month into the joint checking account. The County Payroll Department continued this error for eight (8) months. Because Ms. Gibson had no involvement with the check register or accounting process, and Mr. Gibson never opened bank statements or balanced the checking account on any occasion, as a consequence of his busy work schedule selling farm equipment, they were both unaware of what sum was actually deposited into their account.

To add to the confusion, from January 1, 1999 through June 30, 1999, Ms. Gibson worked beyond her scheduled shifts of four days on, four days off (ten hour days), and accrued 281 hours of overtime. During this same period, Ms. Gibson completed 204 hours of

correspondence courses sponsored and recommended by the County Sheriff's Office.

Finally, on July 19, 1999, the Sheriff's Office discovered errors had been created in accounting, which at first was thought to be underpayment of wages due employees for overtime hours owed to nine (9) County employees. Ms. Gibson was one of the nine. After further examination, Payroll thought there may also be an issue of an overpayment of some wages to Ms. Gibson. The County Sheriff thereupon ordered two (2) detectives to conduct an internal investigation on the wages of Ms Gibson only. On July 20, 1999, and while she was on medical leave from outpatient back surgery, Ms. Gibson received a phone call from one of the detectives while she was still recovering at home. The detective requested she come to the Sheriff's Office. Ms. Gibson assumed the request was for her to again participate in some special project, as she was known by the Department as an employee willing to accept overtime and special work assignments, which she elected to do, as she believed would help advance her career.

For two and one-half (2 ½) hours on July 20, 1999, these two Sheriff detectives interrogated Ms. Gibson about the County wage errors and chose to threaten her with intrusive techniques; they called her a thief and a liar, claimed she had collaborated with others in the Payroll Department to intentionally cause overpayments into the account, and threatened her with criminal prosecution, saying she committed felony grand theft and threatened her with incarceration. Ms. Gibson perceived these threats as destroying her career,

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her job and her life, causing immediate impact to her physical health and fear for her very safety and security.. It was the same as a death threat to her, as she was before made aware of what happens to law enforcement personnel who go to jail.

Ms. Gibson told the detectives she had no knowledge of overpayments to the joint account; that all aspects of payroll record-keeping was not her responsibility; she had nothing to do with balancing the joint checking account, but did agree that if any excess wages had been deposited, and a refund was needed, the County could take her accrued comp time, overtime, holiday time and vacation time, as a good faith showing, and the County could then complete a full reconciliation of her wage and benefit records, and determine what remained and how the issue could be resolved.

Approximately one week following this interrogation, on July 28, 1999, Ms. Gibson's attorney, Mr. Vernon K. Smith, received a phone call from R. Monte MacConnell, Sheriff's Legal Advisor. I have been advised Mr. MacConnell told Mr. Smith the Sheriff wanted Ms. Gibson terminated, and if she did not resign from the Sheriff's Office, she would be processed with felony charges for grand theft and would then be fired immediately. A cascade of events followed, including statements expressed by the Ada County Sheriff and his agents, saying Ms. Gibson was somehow involved in the error, the effect of which was to escalate the County's errors into contention Ms. Gibson was at fault, and either she knew or should have known of the overpayments, and she had a responsibility to report it.

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It was later confirmed by the events on December 16th and 17th, 1999, Ms. Gibson had been officially under surveillance (stalked) by Sheriff detective(s), and was linked solely to these administrative overpayment errors.

Then I was advised, while the investigation continued, Ms. Gibson was placed on administrative leave, without pay, and remained on that inappropriate status until December 27, 1999, when the Sheriff chose to terminate Ms. Gibson, as she refused to resign her employment over the County's accounting errors.

I was also advised that at all times before the July 20, 1999 interrogations began, Ms. Gibson had always been regarded as an exemplary employee; she had never received an unsatisfactory rating, and was deemed an excellent asset to the Sheriff's Office.

Since my initial examination of Ms. Gibson, I have observed her become re-victimized by certain specific events that relate to Ada County's ongoing treatment and conduct against Ms. Gibson, including events that have developed in proceedings involving more intrusive examinations to further assess or diagnose her condition.

I hold the medical opinion Ms. Gibson was re-victimized as a result of the examinations resulting from the orders of June 19, 2003 and April 12, 2005, entered by the Industrial Commission, requiring Ms. Gibson be confronted by Dr. Cynthia Brownsmith, a psychologist, asked to address her condition. Ms. Gibson complied with those orders entered by the Industrial Commission, and Dr. Brownsmith conducted evaluations of Ms. Gibson on June 20, 2003, June 24, 2003,

July 11, 2003, and again on April 14, 2005. These encounters caused her to relive the trauma, and repeat the damages.

Because of the challenges made by Ada County and the State Insurance Fund, essentially claiming Ms. Gibson's Workmen's Compensation claim should be viewed as a "mental-mental" workplace injury instead of a "mental-physical", I saw it would be beneficial and educational to the State Insurance Fund to demonstrate the objective nature of her physical injury, and I did then conduct an electroencephalogram (EEG) brain map diagnostic testing of Ms. Gibson, conducted in my office on March 31, 2005. The data collected from Ms. Gibson's EEG has provided an objective analysis of my original opinion, and has confirmed my October 16, 2002 medical opinion Ms. Gibson is suffering from a psychological workplace injury, and this resulting condition is described as a "mental-physical" injury, known as Post Traumatic Stress Disorder, and must be recognized as a compensable claim under Idaho Workmen's Compensation law.

During the recent re-victimization by Dr. Cynthia Brownsmith on April 14, 2005, the session Ms. Gibson was required to endure was video taped, and I have observed this session and conclude it was unwarranted and intrusive conduct of Dr. Brownsmith as she was unable to manage the stress created when she became unable to effectively reply to Ms. Gibson's questions and concerns about the multitude of inaccuracies, fabrications and misstatements found in Dr. Brownsmith's August 27, 2003 report.

Shortly after Ms. Gibson's explosive outburst on April 14, 2005, it was necessary for my office to examine Ms. Gibson and stabilize her from that confrontational experience. Ms. Gibson was further examined in my office on April 15, 2005.

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In my effort to stabilize Ms. Gibson, following this re-victimization by Dr. Brownsmith, I prescribed Guanabenz to balance the locus caeruleus aspect of Ms. Gibson's brain, which will reduce anxiety, and structure a pathway for our continuing psychotherapy sessions. However, prescribing medications to help calm depression and anxiety does not make a patient immune from re-victimization efforts caused by intrusive and confrontational examinations. I understand further examinations are proposed to take place by Dr. Richard Wilson.

In my May 6, 2005 letter to Mr. Vernon K. Smith, I emphasized my concern any further re-victimizing evaluations of Ms. Gibson must cease, as intrusive medical evaluations conducted by medical advocates, as they are clearly perceived as such by Ms. Gibson, are causing more re-victimization, and that only continues to intensify the symptomatology of Ms. Gibson's Post Traumatic Stress Disorder, and serves to hinder my efforts that focus on treating Ms. Gibson's condition, causing medications and more psychotherapy sessions to address damage control from what is being senselessly caused.

Ms. Gibson is of the personality type that falls in the subset of people who more easily downgrade to the "fight or flight", a system found in all mammals. They are the ones in a group who more easily develop Post Traumatic Stress Disorder or traumatic neurosis. Ms. Gibson is a person who is clearly more reactive and sensitive than the average person. In other words, she responds more sharply to verbal assaults, feels more intensely and has a decreased pain tolerance. She is in the subset of people that develop Post Traumatic Stress Disorder more easily.

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CLINICAL IMPRESSION/MENTAL CONDITION:

As a result of my October 16, 2002 evaluation, I determined Ms. Gibson exhibited symptoms of short-term memory loss, panic attacks, anxiety, hyperreactivity, depression, feelings of loss of self-esteem, and intrusive recollection.

I initially diagnosed Ms. Gibson to be suffering from Post Traumatic Stress Disorder (PTSD), classified as constituting a "mental-physical" injury, and caused as a result of the catastrophic, intrusive and threatening course of conduct utilized by detectives (co-employees if you will), who were ordered to interrogate Ms. Gibson on July 20, 1999. This condition has not and will not resolve fully. On March 31, 2005, I conducted an EEG on Ms. Gibson to demonstrate an objective means of conducting my ongoing findings that support that clinical diagnosis of PTSD, and to determine the ongoing extent of her mental and physical injuries. Findings of that assessment are that Ms. Gibson has lived with the following since the events of July 20, 1999:

- Intrusive memories of the interrogations on a daily basis
- Sleep disturbances where she awakens from nightmares in a panic state
- Emotionally distant, withdrawn and isolated from others
- Loss of interest in social and other activities
- Hypervigilance and startled reactions as a daily activitity
- Avoidance of activities that arouse memories or trauma, such as anything to do with Ada County and the Ada County Sheriff's Office

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- She gets angry and agitated with mixed episodes of depression
- Difficulty with authority figures, and a hard time dealing with others
- An occasional fugue state, accompanied by short-term memory loss and anxiety
- Headaches, stomachaches, dizziness, blurred vision, fatigue and excessive sweating and chills
- Panic attacks, flashbacks, feelings of helplessness, paranoia, insecurity and lack of confidence

Ms. Gibson has been traumatized and does experience progressively worsening anger, irritability, difficulty sleeping, and sometimes unprovoked rage frightening to her and to those around her, especially those in her family that have experienced the change. During the first thirteen (13) months following the events of July 20, 1999, Ms. Gibson remained severely traumatized from the experience she suffered and endured, and due to that condition, she remained unemployed until the month of August 2000. During that period, my opinion is Ms. Gibson suffered from Post Traumatic Stress Disorder, to the extent of being Severe. Since then, taking into consideration her medical history, symptoms, interview behavior, EEG and then having stabilized to the degree to be able to maintain some degree of employment, it would indicate she now suffers from Post Traumatic Stress Disorder in the Moderate Range.

Axis I 309.81	Post Traumatic Stress Disorder, Moderate
Axis II 296.3	Major Depressive Disorder
Axis III	None

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Axis IV	Occupational and Social Impairments with deficiencies in many areas
Axis V	Global Assessment Functioning 55 (current). In the last year 55 to 65

s/ F. LaMarr Heyrend, M.D.
F. LaMarr Heyrend, M.D.
Clinical Psychiatrist

enc: April 4, 2005 EEG/Evoked Potential Review of March 31, 2005 EEG
April 15, 2005 Special Core Evaluation

Appendix 14

Intermountain Neuropsychiatric Center
411 Allumbaugh Street
Boise, Idaho 83704
(208) 376-2518

PATIENT: **Gibson, Stacy**
DOB: 08-30-1958
GENDER: **Female**
DATE: 04-04-05

EEG/EVOKED POTENTIAL REVIEW

EEG: As we go looked at Stacy's total record, we found that she frequently has increased frontal activity, frequently has standard deviations that are in excess of two frontally, frequently has dropout of the right posterior quadrant in P300s. She has extremely low voltage in her eyes open post-hyperventilation study, eyes closed resting study, and the eyes open alert study. In fact, we can safely say that in general she is running at about 25% of the μV^2 that we expect. This is often seen in affective disorders.

On the EEG, we find frontal alpha. Frontal alpha is related to a predisposition to become depressed and hyperactive to stress. Thus, as we look at her study more we recognize that she clearly is disinhibited in the right frontal quadrant. Therefore, the area in which we "put on the brakes" when you become upset is not very functional. Therefore, it is not surprising that she can really get upset, throw dishes, and so forth.

With the increased beta, which is related to anxiety, with the frontal alpha, and with the low voltages in terms of μV^2 on the EEG, we have the pattern of the person who is suffering from generalized anxiety reaction, an affective –

disorder, and one who manifests mood instability because of abnormal activity in the right frontal quadrant, which is the area that "puts on the brakes" when one becomes angry or upset.

EVOKED POTENTIAL: As we look at the evoked potentials, we find that the P300s, which are the imprinting waveform for the end of short-term memory, they tend to lateralize away from the right posterior quadrant towards the left and are not good from the standpoint of morphology. The latency is acceptable. That is the time that it takes for them to form. Certainly, efficient, effective imprinting is questionable because of poor morphology and the fact that they are broken up.

DISPOSITION/PLAN:

Therefore, we can clearly see that we have a person who is in the group of hyperfrontal people with affective disorders, anxiety disorders, and panic disorders that are susceptible development of PTSD. We all know that not everyone develops PTSD but there is a subset that do. What we find is this woman is representative of these findings. Please refer to Veteran's Administration EEG findings in PTSD.

Thus, very clearly what happens is that you have a woman who has a weak ego in that she has had a great deal of difficulty in her life in terms of becoming what she feels she should be and should become, and she finds a career as a police office that solves problems and gives her a good identify, and "presto", she is taken aside and told that her career is over and she is going to the penitentiary, and that she should understand what is going to happen to her. In other

words, they are pointing out to her what happens to police officers in jail. To her, this was a death threat. It would simply rip her life apart. In addition, to have three of her associates put her in a room and pound on her is an unreasonable approach.

In terms of intrusive feelings from watching television, in terms of dreams, and in terms of scanning and being fearful, we can understand. In terms of the fact that she has some problems with gating and flooding of her mind because the input module to her mind is wide open, this tends to decrease the quality of cognition and increase anxiety. With high-anxiety and panic reactions already, it is very easy for her to downgrade the control of the locus caeruleus, the nucleus amygda, and hippocampus, and the flight of fight response (which is what panic is) was brought about.

In retrospect, there is absolutely no question that she would qualify for traumatic neurosis, as defined in DSM-II and DSM-III, and she qualifies for PTSD on the basis that a life-threatening event did, in fact, occur and she felt she was about to be destroyed.

s/ F. LaMarr Heyrend, M.D.
F.L. Heyrend, M.D.
FLH/kvh (752)

Appendix 14

Intermountain Neuropsychiatric Center
411 Allumbaugh Street
Boise, Idaho 83704
(208) 376-2518

PATIENT: **Gibson, Stacy**
DOB: --
GENDER: --
DATE: 04/15/05

SPECIAL CORE EVALUATION

What we have is a situation where we have to recognize that she became grossly upset when she went for an interview and evaluation with the psychologist that her attorney [counsel for Ada County], Mr. Baumann, arranged. She became extremely anxious and had to leave the interview. Her husband then talked to the psychologist, Cynthia Brownsfield [Brownsmith]. He pointed out that all Stacy wanted to accomplish is that the previous record be corrected. He was concerned about the fact that the record was incorrect and they just wished to bring the record into line

I then explained several things. First, I do not look at psychological dynamics the same way I look at neurophysiology. As such, I know that panic attacks involve the locus caeruleus or red nucleus and the hippocampus. This is part of the original reptilian "fight or flight" system. Of course, the locus caeruleus is paired with the nucleus of Raphe and the two of them are in the midbrain (the center of the brain), magenta colored, and that is the autonomic nervous system (sympathetic and parasympathetic). The sympathetic is, of course, the nucleus caeruleus. Therefore, as we look at the situation, we can see that if you have to have all of the noradrenalin responses go through the nucleus of caeruleus

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then, in fact, having it in as tight of regulation as possible will assist in controlling panic attacks. At this particular point, I insisted that Stacy take guanabenz (because it is an alpha-agonist), going up to 4mg b.i.d., to try to balance out the locus caeruleus. This would cause her to have less anxiety. She did not wish to take more medicine but I said that plus Gabitril 4mg b.i.d. might very well handle the anxiety reaction that she is having.

I explained that if you take 100 people, only about 10% develop PTSD in traumatic experiences and these people are predisposed because the locus caeruleus is easy to downgrade. I pointed out that the guanabenz 4mg b.i.d. would help to stabilize and strengthen the locus caeruleus and would help her depression and anxiety. I suggested that Gabitril would be the next addition and that the amount of Xanax she then needs would be considerably reduced. I pointed out the fact that on her EEG, particularly her eyes open alert, her high beta activity is directly related to her anxiety and her PTSD. This has been established through the Veteran's Administration, who accept EEG computerized evaluations because it does show increased beta as one of the signs that says people have PTSD.

PLAN:

- In any event, we had a very long discussion, approximately 50 minutes. I also pointed out to John [Stacy's husband] how to put together a chart that would help the jury to understand where I am coming from in terms of the problem

s/ F.L. Heyrend, M.D.
F.L. Heyrend, M.D.
FLH/kvh (929)

APPENDIX 15 – JUDGMENT ON MOTION FOR SUMMARY JUDGMENT AND MOTION TO STRIKE ENTERED BY JUDGE RONALD J. WILPER, FOURTH DISTRICT COURT (DOCKET NO. 31553), FILED DECEMBER 16, 2004

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Case No. CV OC 0107394D

JUDGMENT AS TO MOTION FOR SUMMARY JUDGMENT AND MOTION TO STRIKE

Filed: December 16, 2004

ADA COUNTY,

Plaintiff,

v.

STACY A. GIBSON

Defendant.

This matter having come on for hearing on December 9, 2004, the Court having granted Plaintiff's Motion for Summary Judgment and denying Plaintiff's Motion to Strike, and the Court having entered its Memorandum Decision and Order Granting Plaintiff's Motion for Summary Judgment on December 10, 2004.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

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1. The Plaintiff's Motion for Summary Judgment is granted and Defendant owes the Plaintiff $8,528.89 for overcompensated salary.

2. The Plaintiff's Motion to Strike Defendant's Affidavit is denied.

DATED this 14th day of Dec., 2004.

s/ Ronald J. Wilper
Ronald J. Wilper
District Judge

APPENDIX 16 –DECISION AND ORDER GRANTING [ADA COUNTY] MOTION FOR SUMMARY JUDGMENT ENTERED BY JUDGE RONALD J. WILPER, FOURTH DISTRICT COURT (DOCKET NO. 31553), FILED DECEMBER 10, 2004

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Case No. CV OC 0107394D

MEMORANDUM DECISION AND ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Filed: December 10, 2004

ADA COUNTY,

Plaintiff,

v.

STACY A. GIBSON

Defendant.

This matter came before the Court on the Plaintiff's Motion for Summary Judgment. On December 9, 2004 the Court heard oral argument on the matter and GRANTED Plaintiff's motion. This written decision constitutes the Court's findings of fact and conclusions of law.

BACKGROUND

This is action for return of overpaid compensation by an employer to an employee. The Defendant was a Records Clerk

for the Ada County Sheriff's office earning a salary of $1,500.00 per month. She eventually received permanent status and became a "classified" employee. Once classified she could only be dismissed for cause. She was then promoted to the position of Jail Technician II, her salary was increased to $1,550.00 per month. Due to a payroll error she actually received over $3,000.00 per month for several months and was over compensated in the amount of $8,528.89. She was eventually terminated by the Sheriff for retaining these overpayments. Ada County filed its lawsuit on a restitution/unjust enrichment theory to recover the money. This matter is before the Court on the Plaintiff's motion for summary judgment on its claim for $8,528.89.

ANALYSIS

The elements of unjust enrichment are: "(!) a benefit is conferred upon defendant by plaintiff, (2) appreciation by the defendant of the benefit, and (3) acceptance of the benefit under circumstances that would be inequitable for the defendant to retain the benefit without payment of the value thereof". Aberdeen-Springfield Canal Company v. Peiper, 133 Idaho 82, 88 (1999).

The Court finds that a benefit was conferred upon the Defendant by the Plaintiff, as the Plaintiff continued to pay her salary as a Records Clerk after they had promoted her to the post of Jail Technician II, therefore she was receiving two salaries for doing one job. The Court finds that the Defendant did appreciate and accept the benefit of the overpayment. The Defendant admitted that she was overcompensated and intended to repay the money. The Court also finds that it would be inequitable for the Defendant to retain the additional

money that she was paid. Thus, the Court finds that Defendant was unjustly enriched.

The Defendant contends that there is a discrepancy over the precise amount of money that the Plaintiff claims. The Court does not find that this is the case. The Court finds that Cheryl Bower, the Controller at the Ada County Clerk/Auditor/Recorder's Office, and Kelli Bolicek, Finance Manager at the Ada County Sheriff's Office, are competent and qualified to provide information on the amount of the overpayment. Both Ms. Bower and Ms. Bolicek have submitted affidavits and calculations showing that $8,528.29 is the amount that was overpaid and must be repaid by the Defendant to the County. The Court accepts these calculations as accurate. Defendant has not presented any evidence to show why the figure of $8,528.89 is incorrect. Defendant has also failed to provide any accounting of her own.

The Court could grant summary judgment on the claim itself and then appoint an auditor to determine the precise amount owed by Defendant if it found that that the amount calculated by Ms. Bower and Ms. Bolicek was inaccurate or at least reasonably questionable. However, the Court does not believe that that is necessary in this case.

The Plaintiff filed a motion to strike an affidavit filed by the Defendant in opposition to the motion for summary judgment. The motion to strike is denied. However, the assertions contained in the affidavit are entitled to little weight and do not raise a genuine issue of material fact.

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CONCLUSION

Based upon the foregoing analysis, the Court hereby GRANTS summary judgment in favor of the Plaintiff and DENIES the Plaintiff's motion to strike. The Plaintiff shall submit a judgment form for the Court's signature.

IT IS SO ORDERED.

DATED this 10th day of December, 2004.

s/ Ronald J. Wilper
Ronald J. Wilper
DISTRICT JUDGE

APPENDIX 17 – MEMORANDUM IN SUPPORT OF [GIBSON] MOTION FOR PERMISSION TO APPEAL FROM DISTRICT COURT'S INTERLOCUTORY ORDER ENTERED SEPTEMBER 16, 2004 BY JUDGE RONALD J. WILPER, FOURTH DISTRICT COURT (DOCKET NO. 31553), LODGED DECEMBER 9, 2004

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Case No. CV OC 0107394D

MEMORANDUM IN SUPPORT OF MOTION FOR PERMISSION TO APPEAL FROM DISTRICT COURT'S INTERLOCUTORY ORDER ENTERED SEPTEMBER 16, 2004

Filed: December 9, 2004

ADA COUNTY,

Plaintiff/Counterdefendant,

v.

STACY A. GIBSON

Defendant/Counterclaimant.

INTRODUCTION

The Defendant/Counterclaimant above-named, through counsel, Vernon K. Smith, pursuant to Rule 12, I.A.R., has requested this Court to enter an order, thereby granting Defendant judicial permission to appeal the District Court's

interlocutory order entered September 16, 2004, to the Idaho Supreme Court for Appellate Review in order to bring into focus controlling questions of law as follows:

1. Whether Ms. Gibson has a Federal statutory right under the *Fair Labor Standards Act* (FLSA), 29 U.S.C. § 216 (b), to initiate and assert her claims for relief against her employer, Ada County, as addressed in her Second Amended Counterclaim, and to pursue her right to recover back pay due for regular wages, overtime wages, and employment entitlements and benefits, in accordance with her protected status as a permanent and classified Ada County employee, which specifically includes her rights to sick leave, vacation pay, additional holiday pay, additional overtime pay, step increases, cost of living increases, continued medical insurance benefits, continued family coverage benefits, continued life and disability insurance, Workman's Compensation coverage, all retirement benefit funds for PERSI (representing 6% of total monthly wages) and PEBSCO (an employee contributory retirement plan), together with available training benefits, and recovery of all other benefits as a result of the inadequate wage and record-keeping procedures that caused the administrative error and overpayment of her wages into a joint checking account under the direct deposit system used by Ada County, through its Payroll Department, resulting in Ms. Gibson's mistaken receipt of funds from the County's negligence and ongoing violations of the FLSA provisions announced in 29 U.S.C. § 201 *et seq*. It was these erroneous overpayment of wages to that account, without her knowledge, that has resulted in actions taken by the Ada County Sheriff, Vaughn Killeen, to initiate malicious and capricious interrogations, threats of termination, violations of her Merit System protection and property rights, and causing Ms. Gibson to suffer a

psychological workplace injury, and then, in a retaliatory and discriminatory manner, and contrary to Federal law (FLSA), Sheriff Killeen did then terminate her employment with Ada County, which has denied all efforts at exhausting any of her administrative due process remedies.

2. Whether Ms. Gibson has a Federal statutory right under the *Fair Labor Standards Act* (FLSA), 29 U.S.C. § 216 (b), to initiate and assert a claim for relief against her employer, Ada County, as addressed in her Second Amended Counterclaim, including the reinstatement of her Ada County employment, resulting from the discriminatory and retaliatory manner in which the Ada County Sheriff, Vaughn Killeen, terminated her employment with the Ada County Sheriff's Office, as a result of the inadequate and incorrect wage and record-keeping procedure that caused an administrative payroll error and overpayment of Defendant's salary into a joint checking account under the direct deposit system used by the County, resulting in Defendant's mistaken receipt of funds from the County's negligence and ongoing violations of the FLSA provisions announced in 29 U.S.C. § 201 *et seq*.

3. Whether Ms. Gibson has a Federal statutory right under the *Fair Labor Standards Act* (FLSA), 29 U.S.C. § 216 (b), to initiate and assert a claim for relief against her employer, Ada County, as addressed in her Second Amended Counterclaim, including recovery of liquidated damages equal to two (2) times the recovery of back pay and benefits as addressed in Paragraphs No. 1 & 2 above.

4. Whether Ms. Gibson has a Federal statutory right under the *Fair Labor Standards Act* (FLSA), 29 U.S.C. § 216 (b), to initiate and assert a claim for relief against her employer, Ada County, as addressed in her Second Amended Counterclaim,

including recovery of costs and attorney fees associated with her litigation in this matter for the reinstatement of her employment, and recovery of back pay and benefits as addressed in Paragraphs No. 1 & 2 above.

5. Whether Ms. Gibson, as a prerequisite to initiating her Federal statutory right under the *Fair Labor Standards Act* (FLSA), 29 U.S.C. § 216 (b), is required to submit a "notice-of-claim" to Ada County pursuant to the *Idaho Tort Claims Act*, § 6-906, as a condition precedent to initiating this claim to enforce her federally established and protected statutory rights to unconditional relief as addressed in her Second Amended Counterclaim, and referenced in Paragraphs No. 1, 2, 3 & 4 above.

6. Whether the lower court obstructed and deprived Ms. Gibson the constitutional right to procedural due process concerning her employment property rights and the wages owed to her by Ada County, when the lower court denied access to judicial remedies concerning her Federal statutory "right of action" pursuant to the *Fair Labor Standards Act*, 29 U.S.C. § 201 *et seq*.

Ms. Gibson does contend the subject matter in this dispute does involve controlling questions of law, of great public interest, with a potential of affecting any one of the many employees of Ada County, and the action of this District Court to preclude this Defendant from properly asserting her "right of action", affirmative defenses and causes of action addressed in her Second Amended Counterclaim, is contrary to existing Federal and State case law.

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STATEMENT OF FACTS

Defendant filed her Answer, Affirmative Defenses and Counterclaim in this case on May 7, 2002, therein providing detailed facts surrounding Defendant's employment and the protection and rights afforded her under the provisions of the Ada County Code, County Personnel System, § 1-7-1 through § 1-7L-10 and specifically the Federal protection laws concerning employment, entitled the *Fair Labor Standards Act*, 29 U.S.C. § 201 *et seq.*, that applied to Defendant's employment under the statutory scheme of Federal law and specific language contained in the Ada County Code, § 1-7C-1.

On July 11, 2002, Defendant requested this Court to amend her counterclaim to specifically describe the detail of her allegations, and the manner in which Ada County and its Sheriff's Office violated her rights and provisions of the *Fair Labor Standards Act*, 29 U.S.C. § 201 *et seq.* It was the consequence of those County violations that caused the mistaken receipt of funds to become an issue. The effect of the overpayments was used to wrongfully terminate Defendant, as they used the errors caused from the erroneous wage and record-keeping process used by Ada County and the Payroll Department. This administrative error was due to the flawed accounting process used in 1998 and 1999, and remained in effect until this ongoing non-compliance was made a major issue of concern, and administrative efforts were taken by the County to come into some level of compliance with Federal mandates, undertaken about January 10, 2002.

On February 19, 2003, this Court signed an Order (prepared by counsel for Ada County) denying Defendant's Motion to Dismiss the County's Complaint, and denied Defendant's Motion to Amend Counterclaim, "sought to

include an additional cause of action under the Fair Labor Standards Act, 29 U.S.C. § 211 (c)". The effect of the Order was to deny Defendant her statutory right to a cause of action, her constitutional right to have due process of law, and a right to engage a judicial forum to seek redress for the County's abuse of due process and FLSA violations, and if left to stand, as ordered, it would allow the County to escape judicial review and imposition of sanctions for their wage and record-keeping violations, causing Gibson's termination from the County's non-compliance of mandatory law. Their violation of these employee rights, privileges and protections under the law are founded in the enforcement of Federal laws, subject to appropriate enforcement in a state's judicial forum. These rights of enforcement cannot be waived, modified or precluded, as a matter of law, for employer violations identified as an employee dispute concerning salary and wage matters, such as record-keeping, under payments, overpayments, equal pay or employee benefits.

Defendant filed a Motion, supported with a Memorandum, requesting this Court reconsider that February 19, 2003 Order. Defendant provided authority for the Court's reference, demonstrating the manner and nature by which the Federal courts have ruled on employment rights under the *Fair Labor Standard Act*, and that employment rights cannot be thwarted, abridged or waived; that the *Act* cannot be construed in any narrowing manner; that the employer is responsible for "knowledge" and "management" of the *Act*; the *Act* compels the employer (solely) to make, keep and preserve accurate employee wage records; that under no circumstance or condition, and at no time, or for any reason, may the employer transfer or attempt to transfer responsibility under the *Act* to the employee; that failure of the employer to comply with any

provision of the *Act* is at the employer's own peril, and the employer is subject to ramifications and sanctions.

Defendant supplemented that Memorandum on April 8, 2003, providing additional authority to support that Motion, which confirmed Ada County knowingly violated FLSA, and had been in a continuing state of non-compliance for a period of years, and the County Commissioners, in their last administration, and following Defendant's termination and fear of ramifications from their misconduct, attempted compliance with the *Act* by January 10, 2002. We attached documents, specifically addressing this fact, and the frantic realization they needed to become compliant, to some meaningful degree, or face consequences. We showed the Court the Gallagher case, and the FLSA violations involving his wrongful treatment at the hands of Ada County.

Without detail, the Court denied Defendant's Motion to Reconsider, on April 18, 2003 The Court's ruling was absent Findings of Fact or Conclusions of Law. A Finding of Fact was deemed essential by Defendant, as some factual findings had to be made to conclude why Defendant would not be allowed a fundamental right of due process and a statutory right to enforcement of the provisions of FLSA.

Findings and Conclusions would have clarified the lingering misperception advanced by the County, so the issues would be clear when presented for appellate review.

On May 2, 2003, Defendant moved for Permission to Appeal the District Court's Interlocutory Order entered February 19, 2003, requesting the Court enter an order granting Defendant permission to appeal the District Court's interlocutory order to the Idaho Supreme Court, in order to

bring into focus this fundamental and controlling question of the application of the *Fair Labor Standards Act* (FLSA), the legitimate claims raised by Defendant, the rights of Defendant and violations of the wage and record-keeping procedure by Ada County and the Payroll Department. The facts were clear the administrative error caused the overpayment into the joint checking account under the direct deposit system, resulting in Defendant's mistaken receipt of wages, all due to the County's violation of the FLSA provisions announced in 29 U.S.C. § 211 (c).

Defendant did contend the issues involved a controlling question of law, the application of FLSA as a defense and as a statutory right to a cause of action, and the Court's Order precluded Defendant from asserting her rights. Defendant demonstrated the Order was contrary to existing Federal law, and did prevent her from advancing her statutory rights to maintain the claims as provided for in her Second Amended Counterclaim and subsequent pleadings. Defendant scheduled the Motion for Permissive Appeal for hearing, and it came before the Court on June 11, 2003, as scheduled, and the Court stated, upon further analysis, Ms. Gibson did have a cause of action pursuant to the *Fair Labor Standards Act*, and the Court would allow Defendant the right to submit an amended Counterclaim because Plaintiff had not filed its reply to the original counterclaim. Because of that statement, it was no longer necessary to pursue the Motion for Permissive Appeal, based upon what the Court said. This all took place "off the record", as the Court said, "we are not on record". It now appears counsel for Ada County is confused as to the June 11, 2003 hearing scheduled before the Court to decide the Motion whether to grant or deny Defendant's Motion for Permissive Appeal. See Affidavit of Ray J. Chacko in Support of the County's Supplemental Memorandum. We are now back to

the point we were at on June 11, 2003, only sixteen (16) months later. Had the Court not allowed the FLSA claims at that time, as it made the announcement off the record, it would have been necessary for Defendant to pursue the permissive appeal motion. Because of what the Court said, it became moot and the claims could be advanced.

Defendant's Motion for Permissive Appeal concerned Defendant's statutory right to assert Ada County's violations of FLSA in this action as a Counterclaim. Allowing Defendant to simply amend her Counterclaim, without asserting causes of actions pursuant to FLSA, would have no productive effect, as the issue for permissive appeal was the right to assert FLSA statutory rights as a claim in this dispute. The appeal issue would become moot only if the Court reversed its decision on the right to assert FLSA claims, and grant the amended counterclaim. It was deemed moot by the Court's announcement our FLSA claims could be asserted.

On June 11, 2004, this Court entered an Order "Withdrawing Order Denying Motion for Reconsideration and Order", and ruling that "counterclaimant may file an amended counterclaim pursuant to Rule 15, I.R.C.P. as a matter of right because no responsive pleading to the original counterclaim has been filed". The Court later entered a Supplemental Order, dated January 1, 2005, and stated, "On 6/11/03 the court ruled that the counterclaimant has a right to file an amended counterclaim because the plaintiff had not filed a reply to the original counterclaim".

CASE AUTHORITY AND ARGUMENT

Permissive Appeal

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The Idaho Supreme Court stated in Kindred v. Amalgamated Sugar Co., 118 Idaho 147, 794 P.2d 309 (1990):

> "Under I.A.R. 12, a party may seek permission to appeal from an interlocutory order which is not otherwise appealable as a matter of right under I.A.R. 11 (d). Generally, an appeal under I.A.R. 12 will be permitted when the order involves a controlling question of law as to which there is substantial grounds for difference of opinion and that an immediate appeal may materially advance the orderly resolution of the litigation. *Budell v. Todd*, 105 Idaho 2, 665 P.2d 701 (1983)."

Defendant does contend the subject matter does involve a controlling question of law, and the current District Court has precluded Defendant, contrary to existing Federal case law, from properly defending and advancing her cause of action as provided for in her Second Amended Counterclaim and subsequent pleadings to be processed in the Court.

Defendant's Federal Statutory "Right of Action"

Pursuant to 29 U.S.C. § 216 (b)

Congress adopted the *Fair Labor Standards Act*, 29 U.S.C. § 201 *et seq.* in 1938, as remedial legislation to address employment disputes over wages, pay, salaries, discriminatory, retaliatory and capricious terminations resulting from wage and record-keeping disputes over hours worked, payment of wage, and employees' remedies. The courts have consistently determined any attempt to impose restrictive interpretation of the *Act* is contrary to that congressional intent. See Lamon v.

City of Shawnee, Kan., 754 F.Supp. 1518 (D.Kan 1991). All employment subject to the *Fair Labor Standards Act* must be construed to include all rights and all terms of the Act. See Manseau v United States, 52 F Supp 395(DC Mich., 1943); Walling v McKay, 70 F Supp 160 (DC Neb., 1946), affd (CA8 Neb) 164 F2d 40; Orminski v Hyland Electrical Supply Co., 326 Ill App 392, 62 NE2d 14 (1945). No party can attempt to limit the scope of the *Fair Labor Standards Act*. See Kappler v Republic Pictures Corp., 59 F Supp 112 (DC Iowa, 1945), affd (CA8 Iowa) 151 F2d 543, 162 ALR 228, affd 327 US 757, 90 L Ed 991, 66 S Ct 523, reh den 327 US 817, 90 L Ed 1040, 66 S Ct 804. The Federal courts protect the employee against abuse of process that could affect any of the rights and duration of employment.

An employee is protected under the *Act* even when he or she communicates a failure to perform a mandatory duty (accurate record-keeping). The employee is protected at all times, under § 215 (a)(3) of the *Act*, and the employer will be in violation of the *Act* if any adverse action is taken against the employee, over wage underpayments and overpayments caused from inadequate record-keeping procedures, as that would result in discriminatory misconduct. In short, an employee who "complains" to their employer about violations of FLSA, such as administrative errors from improper, incorrect or inaccurate wage and salary record-keeping, is protected also from discriminatory and retaliatory punishment, or termination (FLSA § 215 (a)(3)). Ms. Gibson complained about the errors during her early tenure with Ada County, and ultimately decided to live with their errors, only thereafter to become the subject of discipline from these ongoing administrative errors. They fired her over the County's excessive wage deposits to a joint account, and foolishly said it was her fault for not catching it, being aware of it or reacting to it, despite the fact

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Ada County alone controls payroll, records, deposits and debits to any direct deposit account with any employee; that they generated their own pay voucher form, put their own figures on it, even described a base salary of $1,550.00 (should have been (1,575.00), and exercised total autonomy over payroll matters.

In Hageman v. Park West Gardens, 480 N.W.2d 223 (N.D. 1992, Brennan v. Maxey's Yamaha, Inc., 513 F.2d 179, 180 (8th Cir. 1975), the North Dakota Supreme Court made the relevant comment:

> "The Fair Labor Standards Act "prohibits discrimination against an employee who asserts or threatens to assert his or her FLSA rights."
>
> "Where the immediate cause or motivating factor of a discharge is the employee's assertion of statutory rights, the discharge is discriminatory under [29 U.S.C.] § 215 (a)(3) whether or not other grounds for discharge exist. Goldberg v. Bama Manufacturing Corp., 302 F.2d 152 (5th Cir. 1962); Mitchell v. Goodyear Tire & Rubber Co., 278 F.2d 562 (8th Cir. 1960)."

The North Dakota Supreme Court further stated: "Thus, where an employee is fired and the termination is motivated in any part by the employee's assertion of rights under the Act, such termination is deemed discriminatory." See also Martin v. Gingerbread House, Inc., 977 F.2d 1405, 1408 N. 4 (10th Cir. 1992) and Love v. RE/MAX of America, Inc., 738 F.2d 383, 387 (10th Cir. 1984).

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FLSA is deliberate and specific, and requires the employer to keep accurate records showing whether the employer (Ada County) is being compliant with FLSA, and this record-keeping activity is a means to a legitimate end, since these records are *quasi*-public in character. In one of the earliest cases involving FLSA record-keeping, Walling v. De Soto Creamery & Produce Co., 51 F. Supp. 938 (DC Minn. 1943), the court made the following conclusion of law:

> "By failing to keep true records of the hours worked each work day and each workweek by each of its employees, and by making or causing to be made arbitrary, fictitious and false entries, purporting to reflect the hours worked each day and each workweek by each of its employees, the regular rate of pay, the regular straight time earnings, and the additional overtime earnings of many of its employees as above stated, the defendant has violated the provisions of Sections 11 (c) and 15 (a)(5) of the Act."

When Ms. Gibson denied the contentions of misconduct alleged by Sheriff's agents, on July 20, 1999 (during two (2) interrogations), and thereafter on two (2) more occasions, August 6, 1999 and September 27, 1999, Ms. Gibson asserted her rights over these administrative errors, told them where the fault lies, and the action taken from her complaints about the overpayments and record-keeping errors was threats to her employment. The Ada County personnel created and perpetuated the administrative error (incorrect and inaccurate FLSA record-keeping), and that was the only basis for the retaliation, for the threat of prosecution, for the threat of discipline, and for the her termination. Ms. Gibson had no

participation or involvement in any of the County's mandatory FLSA record-keeping process; she was not aware of the error, was not a participant in the disbursement of wages, and never withdrew funds from the account, to even suggest any knowledge of the County's error. The County had the exclusive right to debit the account at any time, by the terms of the voluntary direct deposit pay program.

There was never any basis for a "criminal investigation" of Ms. Gibson, as she had no say in the mandatory record-keeping duties and obligations of FLSA. The County ascertained their own administrative errors on July 19, 1999, and they interrogated Ms. Gibson, whereby she expressed her attitude over their errors, their abuse of her rights, and she voiced her concerns, and asserted her employment rights and the statutory protections provided her by the terms of FLSA. All action taken by the County on July 19, 1999, and all times thereafter, was retaliatory action over these FLSA violations, and is addressed by Lambert v. Ackerley, 180 F.3d 997 at 1007-1008 (9th Cir. 1998), E.E.O.C. v. Romeo Community Schools, 976 F.2d 985 at 989 (6th Cir. 1992), Hageman v. Park West Gardens, Brennan v. Maxey's Yamaha, Inc., *supra*, and Walling v. De Soto Creamery & Produce Co., *supra*.

Defendant is Entitled to Bring *Fair Labor Standards Act* Claims for Employment Reinstatement, Recovery of Wages Owed, Liquidated Damages, Costs and Attorney Fees

This issue came on for hearing before the Court on January 23, 2003. The Court stated:

> "I had also previously ruled that the Fair Labor Standards Act is not applicable in this case, and

> to the extent that there was any question about allowing the plaintiff in Gibson versus Ada County from arguing, or amending her complaint to add a claim alleging that the Fair Labor Standards Act applies, that particular motion is denied. Okay?
>
> "The court will not allow the defendant, or rather Ms. Gibson, to amend her complaint to allege a violation of the Fair Labor Standards Act based on the facts of this controversy, based on the court's previous ruling that the Fair Labor Standards Act does not apply." (T., p. 20, L 25-p. 21, L 13).

Now, in its September 16, 2004 Order, this Court again stated Gibson is not entitled to bring Fair Labor Standards Act claims against Ada County. Neither in the January 23, 2003 hearing, nor now in its September 16, 2004 Order, has this Court offered any case law to support its contention that Ms. Gibson is not entitled to bring an action pursuant to FLSA. Defendant has a Federal statutory right of action, to be initiated in state or federal court, for recovery against Ada County for wages that are due and owing and for other FLSA violations.

Title 29 U.S.C. § 216 (b) states as follows:

> "Damages; **right of action**; **attorney's fees** and **costs**; termination of right of action:
>
> Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or

their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of
section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of

> unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title". (Emphasis added).

Those first words of 29 U.S.C. § 216 (b) – "**right of action**", confer a Federal statutory right upon an individual to initiate, in a state or federal court (complaint or counterclaim), a cause of action against an employer, including a public agency, for wages the employer has failed to pay and are due the employee, under either § 206 or § 207 of the *Act*. No person, including a judicial officer of this State, has a right to interfere, obstruct or deny that Federal statutory right conferred to any individual, at any time. See Breuer v. Jim's Concrete of Brevard, Inc., 538 U.S. 691 (2003).

When any person, including the judicial officer of any state or federal court, denies a constitutional or a statutory right, that denial constitutes a civil rights violation under Title 42 § 1983.

Pursuant to 29 U.S.C. § 216 (b), the only time a situation exists, as a matter of law, where the "right of action" of an individual can be denied or terminated, is when there is a "filing of a complaint by the Secretary of Labor in an action under section 217 of this title". When the Secretary, U.S. Department of Labor, has intervened in behalf of an individual in an FLSA action, that Federal pursuit preempts the individual's pursuit of their own claim. Until that occurs, no person, entity, state agency, governmental subdivision, municipality or court of law (state or federal), is statutory

authorized to obstruct, deny, or interfere with any individual's statutory "right of action" to pursue a claim for unpaid wages, under § 206 or § 207 of the *Act*. The Secretary of U.S. Department of Labor has not yet decided to intervene in this dispute, though an investigation may be in progress. This Defendant has a statutory right under 29 U.S.C. § 216 (b), to pursue her "right of action" against Ada County, as announced in her Second Amended Counterclaim, and without obstruction, denial or interference by this Court. See Mitchell v. DeMario Jewelry, 361 U.S. 288 (1960).

Ada County has violated § 206 and § 207 repeatedly when they failed to provide Defendant the wages owed her, and when they failed to perform the mandatory record-keeping acts of 29 U.S.C. § 211 (c), and Defendant's claim is described and alleged in her Second Amended Counterclaim. When Ada County failed to provide Defendant those wages, 29 U.S.C. § 216 (b) conferred a Federal statutory "right of action", to enlist the aid of any federal or state court with proper venue, to recover those wages to her.

29 U.S.C. § 216 (b) also confers a Federal statutory "right of action" to engage a judicial proceeding for legal or equitable relief appropriate to effectuate the purposes of § 215 (a)(3) of the *Act*, including without limitation, employment, reinstatement, promotion, and the payment of wages, liquidated damages, and attorney fees. Defendant alleges Ada County violated § 215 (a)(3) and § 215 (a)(4), when they failed to produce and maintain accurate records mandated by § 211 (c) of the *Act*, when they discriminated against her, retaliated against her, and terminated her protected and classified employment. Because Ada County discriminated and wrongfully discharged her from her employment, 29 U.S.C. § 216 (b) conferred a Federal statutory "right of action", and a

cause of action to enlist the aid of such a federal or state court to recover those wages and secure those remedies, as addressed in her Second Amended Counterclaim.

ASSERTION OF COVERAGE

> Pub.L. 99-150, Sec. 8, Nov. 13, 1985, 99 Stat. 791, provided that: "A public agency which is a State, political subdivision of a State, or an interstate governmental agency and which discriminates or has discriminated against an employee with respect to the employee's wages or other terms or conditions of employment because on or after February 19, 1985, the employee asserted coverage under section 7 of the Fair Labor Standards Act of 1938 (29 U.S.C. § 207) shall be held to have violated section 15(a)(3) of such Act (29 U.S.C. § 215(a)(3)). The protection against discrimination afforded by the preceding sentence shall be available after August 1, 1986, only for an employee who takes an action described in section 15(a)(3) of such Act."

See 73 Am Jur 25, Second Edition, § 430-§ 434, Statutory Rights and Remedies.

After Congress enacted FLSA, the U.S. District Courts recognized the right of an individual to not only maintain an FLSA action, but the right to prosecute it to final judgment. In Apple v. Shulman Publications, 65 F.Supp. 677 (U.S.D.C. NJ 1943), the court affirmatively stated:

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> "The provisions of the Fair Labor Standards Act of 1938 are comprehensive; they define minimum labor standards and establish adequate remedies for their enforcement. When the Act is read and considered in its entirety, it seems reasonably clear that these remedies are exclusive and are not subject to exception. Section 216(b) of the Act grants to the aggrieved employee a right to maintain an action for unpaid minimum wages and overtime compensation "in any court of competent jurisdiction. This right to "maintain" the action includes not only the right to initiate it but the right to prosecute it to final judgment. Any other construction would nullify the statutory provision and defeat the right therein reserved to the employee".

In addition to a statutory right to pursue a "right of action" against Ada County, Defendant Gibson also has a right to a trial by jury, and a right to a final judgment against Ada County, as a matter of law, and this State Court may not interfere, obstruct or deny those rights. See Monterey v. Del Monte Dunes at Monterey, LTD., 526 U.S. 687, 707-708 (1999), Lorillard v. Pons, 434 U.S. 575, 580 (1978); and Lewis v. Times Pub. Co., 185 F.2d 457 (5th Cir. 1950). See also Brooklyn Bank v. O'Neil, 324 U.S. 697 (1945).

At no time can an individual be denied by anyone (including the employer, another employee, a prosecuting attorney, a judge) their statutory right to initiate a claim for unpaid wages that are due them from an FLSA employer. An individual is statutorily authorized, without need for any permission from any court, to initiate a private action against

an employer under FLSA, without intrusion from a court of law.

> "The standard for reviewing a dismissal for failure to state a cause of action pursuant to I.R.C.P. 12(b)(6) is the same as the standard for reviewing a grant of summary judgment. *Coghlan v. Beta Theta Pi Fraternity,* 133 Idaho 388, 398, 987 P.2d 300, 310 (1999); *Rim View Trout Co. v. Dep't. of Water Resources,* 119 Idaho 676, 677, 809 P.2d 1155, 1156 (1991). The grant of a Rule 12(b)(6) motion will be affirmed where there are no genuine issues of material fact and the case can be decided as a matter of law. *Coghlan,* 133 Idaho at 398, 987 P.2d at 310; *Eliopulos v. Idaho State Bank,* 129 Idaho 104, 107-08, 922 P.2d 401, 404-05 (Ct.App. 1996). When reviewing an order of the district court dismissing a case pursuant to Rule 12(b)(6), the nonmoving party is entitled to have all inferences from the record and pleadings viewed in its favor, and only then may the question be asked whether a claim for relief has been stated. *Coghlan,* 133 Idaho at 398, 987 P.2d at 310. The issue is not whether the plaintiff will ultimately prevail, but whether the party is entitled to offer evidence to support the claims. *Orthman v. Idaho Power Co.,* 126 Idaho 960, 962, 895 P.2d 561, 563 (1995)".

See Cunningham v. Jensen, Idaho Court of Appeals, Docket No. 29770 (App. 2004).

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Gibson's Claims are Not Barred by Idaho Tort Law

In Defendant's Title 42 case previously before this District Court Judge (Case No. CV OC 0205601D), and now on appeal before the Idaho Supreme Court (Docket No. 29694), the same position was taken of a notice prerequisite was raised by Ada County, and accepted by this Court, suggesting Ms. Gibson was required to file a timely notice of her claim under the *Idaho Tort Claims Act*, Idaho Code, § 6-906. This Court decided in the Title 42 case that she had not complied with § 6-906, causing her claims to be barred.

Case authority tells us such an argument made in the Title 42 case, as well as the argument being presented here in this case, is also without merit. There are no procedural barriers, such as a timely notice of claims under a state tort statute that are intended, or allowed, when an individual pursues a Federal statutory right for enforcement of a claim under a Federal enactment.

The case of Felder v. Casey, 487 U.S. 131 (1988), involving a Title 42 § 1983 claim, expressed the issue over a state's notice-of-claim tort statute. The question brought before the U.S. Supreme Court was essentially one of pre-emption. In that case, the issue was whether the application of the State's (Wisconsin) notice-of-claim provision to § 1983 action brought in state court was consistent with the goals of the federal civil rights laws, allowing such a requirement to become an obstacle to the accomplishment and execution of the full purpose and objective of Congress.

Specifically, the Court stated at page 131:

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> "Because the Wisconsin notice-of-claim statute conflicts in both its purpose and effects with § 1983's remedial objectives, and because its enforcement in state-court actions will frequently and predictably produce different outcomes in § 1983 litigation based solely on whether the claim is asserted in state or federal court, it is pre-empted
> pursuant to the Supremacy Clause when the § 1983 action is brought in a state court. Pp. 138-153".

The *Felder* Court further stated on page 141:

> "...the application of the notice requirement burdens the exercise of the federal right by forcing civil rights victims who seek redress in state courts to comply with a requirement that is entirely absent from civil rights litigation in federal courts. This burden, as we explain below, is inconsistent in both design and effect with the compensatory aims of the federal civil rights laws. Second, it reveals that the enforcement of such statutes in § 1983 actions brought in state court will frequently and predictably produce different outcomes in federal civil rights litigation based solely on whether that litigation takes place in state or federal court. States may not apply such an outcome-determinative law when entertaining substantive federal rights in their courts", and pages 143-145,

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"The decision to subject state subdivisions to liability for violations of federal rights, however, was a choice that Congress, not the Wisconsin Legislature, made, and it is a decision that the State has no authority to override. Thus, however understandable or laudable the State's interest in controlling liability expenses might otherwise be, it is patently incompatible with the compensatory goals of the federal legislation, as are the means the State has chosen to effectuate it".

"This incompatibility is revealed by the design of the notice-of-claim statute itself, which operates as a condition precedent to recovery in all actions brought in state court against governmental entities or officers. *Sambs* v. *Nowak,* 47 Wis.2d 158, 167, 177 N.W.2d 144, 149 (1970). "Congress," we have previously noted, "surely did not intend to assign to state courts and legislatures a conclusive role in the formative function of defining and characterizing the essential elements of a federal cause of action." *Wilson,* 471 U.S., at 269. Yet that is precisely the consequence of what Wisconsin has done here: although a party bringing suit against a local governmental unit need not allege compliance with the notice statute as part of his or her complaint, *Nielsen, supra,* at 580, 334 N.W.2d, at 245, the statute confers on governmental defendants an affirmative defense that obligates the plaintiff to demonstrate compliance with the notice requirement before he or she may recover at all,

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a showing altogether unnecessary when such an action is brought in federal court. States, however, may no more condition the federal right to recover for violations of civil rights than bar that right altogether, particularly where those conditions grow out of a waiver of immunity which, however necessary to the assertion of state-created rights against local governments, is entirely irrelevant insofar as the assertion of the federal right is concerned, see *Martinez,* 444 U.S., at 284, and where the purpose and effect of those conditions, when applied in § 1983 actio[illegible] is to control the expense associated with the very litigation Congress has authorized".

"This burdening of a federal right, moreover, is not the natural or permissible consequence of an otherwise neutral, uniformly applicable state rule. Although it is true that the notice-of-claim statute does not discriminate between state and federal causes of action against local governments, the fact remains that the law's protection extends only to governmental defendants and thus conditions the right to bring suit against the very persons and entities Congress intended to subject to liability. We therefore cannot accept the suggestion that this requirement is simply part of "the vast body of procedural rules, rooted in policies unrelated to the definition of any particular substantive cause of action, that forms no essential part of `the cause of action' as applied to any given plaintiff." Brief for International City

Management Association et al. as *Amici Curiae* 22 (Brief for *Amici Curiae*). On the contrary, the notice-of-claim provision is imposed only upon a specific class of plaintiffs — those who sue governmental defendants — and, as we have seen, is firmly rooted in policies very much related to, and to a large extent directly contrary to, the substantive cause of action provided those plaintiffs. This defendant-specific focus of the notice requirement serves to distinguish it, rather starkly, from rules uniformly applicable to all suits, such as rules governing service of process or substitution of parties, which respondents cite as examples of procedural requirements that penalize noncompliance through dismissal. That state courts will hear the entire § 1983 cause of action once a plaintiff complies with the notice-of-claim statute, therefore, in no way alters the fact that the statute discriminates against the precise type of claim Congress has created", and pages 145-148,

"In *Wilson,* we held that, for purposes of choosing a limitations period for § 1983 actions, federal courts must apply the state statute of limitations governing personal injury claims because it is highly unlikely that States would ever fix the limitations period applicable to such claims in a manner that would discriminate against the federal right. Here, the notice-of-claim provision most emphatically does discriminate in a manner detrimental to the federal right: only those persons who wish to

sue governmental defendants are required to provide notice within such an abbreviated time period".

"Finally, the notice provision imposes an exhaustion requirement on persons who choose to assert their federal right in state courts, inasmuch as the § 1983 plaintiff must provide the requisite notice of injury within 120 days of the civil rights violation, then wait an additional 120 days while the governmental defendant investigates the claim and attempts to settle it. In *Patsy* v. *Board of Regents of Florida,* 457 U.S. 496 (1982), we held that plaintiffs need not exhaust state administrative remedies before instituting § 1983 suits in federal court. The Wisconsin Supreme Court, however, deemed that decision inapplicable to this state-court suit on the theory that States retain the authority to prescribe the rules and procedures governing suits in their courts. 139 Wis.2d, at 623, 408 N.W.2d, at 23. As we have just explained, however, that authority does not extend so far as to permit States to place conditions on the vindication of a federal right. Moreover, as we noted in *Patsy,* Congress enacted § 1983 in response to the widespread deprivations of civil rights in the Southern States and the inability or unwillingness of authorities in those States to protect those rights or punish wrongdoers. *Patsy, supra,* at 503-505; see also *Wilson* v. *Garcia,* 471 U.S., at 276-277, 279. Although it is true that the principal remedy Congress chose to provide injured persons was immediate

access to *federal* courts, *Patsy, supra,* at 503-504, it did not leave the protection of such rights exclusively in the hands of the federal judiciary, and instead conferred concurrent jurisdiction on state courts as well. 457 U.S., at 506-507. Given the evil at which the federal civil rights legislation was aimed, there is simply no reason to suppose that Congress meant "to provide these individuals immediate access to the federal courts notwithstanding any provision of state law to the contrary," *id.,* at 504, yet contemplated that those who sought to vindicate their federal rights in state courts could be required to seek redress in the first instance from the very state officials whose hostility to those rights precipitated their injuries."

"Respondents nevertheless argue that any exhaustion requirement imposed by the notice-of-claim statute is essentially *de minimis* because the statutory settlement period entails none of the additional expense or undue delay typically associated with administrative remedies, and indeed does not alter a claimant's right to seek full compensation through suit. This argument fails for two reasons. First, it ignores our prior assessment of "the dominant characteristic of civil rights actions: *they belong in court.*" *Burnett,* 468 U.S., at 50 (emphasis added). "These causes of action," we have explained, "exist independent of any other legal or administrative relief that may be available as a matter of federal or state law. They are judicially enforceable *in the first instance.*" *Ibid.*

(emphasis added). The dominant characteristic of a § 1983 action, of course, does not vary depending upon whether it is litigated in state or federal court, and States therefore may not adulterate or dilute the predominant feature of the federal right by imposing mandatory settlement periods, no matter how reasonable the administrative waiting period or the interests it is designed to serve may appear".

In conclusion, the Felder Court wrote, at page153:

"In enacting § 1983, Congress entitled those deprived of their civil rights to recover full compensation from the governmental officials responsible for those deprivations. A state law that conditions that right of recovery upon compliance with a rule designed to minimize governmental liability, and that directs injured persons to seek redress in the first instance from the very targets of the federal legislation, is inconsistent in both purpose and effect with the remedial objectives of the federal civil rights law. Principles of federalism, as well as the Supremacy Clause, dictate that such a state law must give way to vindication of the federal right when that right is asserted in state court".

See also Wilson v. Garcia, 471 U.S. 261, (1985) and Henderson v. State, 110 Idaho 308, 311, 715 P.2d 978 (1986). Since the *Felder* decision was issued in 1988, various other courts have cited the same result as the U.S. Supreme Court determined in *Felder*. Those cases are Palazzolo v. Rhode

Island, 533, U.S. 606, 626 (2001); Rumbles v. Hill, 182 F.3d 1064, 1069 9th Cir. 1999); Silva v. Crain, 169 f.3d 608, 610 (9th Cir. 1999); and Ellis v. City of San Diego, 176 F.3d 1183, 1191 (9th Cir. 1999). See also Kimes v. Stone, 84 F.3d 1121, 1127 (9th Cir. 1996).

Prior to the U.S. Supreme Court's decision in *Felder* (1988) our Idaho Supreme Court recognized (1982) that a notice-of claim requirement pursuant to the *Idaho Tort Claims Act*, are inapplicable to a cause of action brought under a Federal enactment. See Overman v. Klein, 103 Idaho 795, 798-799, 654 P.2d 888 (1982), and in the case of Sweitzer v. Dean, 118 Idaho 568, 798 P.2d 27 (1990), our Supreme Court clearly stated:

> "A state's notice-of-claim statute which provides that no action may be brought or maintained against a state government subdivision unless claimant provides written notice within a certain period of time is preempted when a federal civil rights action is brought in state court".

When an individual, such as Defendant, pursues a statutory right for the enforcement of a claim under a Federal enactment, unless otherwise specifically provided for in the Federal enactment, no state exhaustion of remedies or other notice-of-claim requirements exist. Those state notice-of-claim requirements are preempted by Federal law. In Ms. Gibson's Title 42 action, and now in her action brought pursuant to the *Fair Labor Standards Act*, she was not required to give any notice of her claim to anyone, especially Ada County. The controlling and only statute of limitations for an FLSA action, is found in 29 U.S.C. § 255. Ada County is prohibited from

frivolously suggesting the notice-of-claim requirement found in the *Idaho Tort Claims Act* is a mandatory procedure that must be used prior to presenting an FLSA claim, and failure to do so bars any right of action under FLSA. This argument by Ada County is contrary to law, without any legal foundation, and is bad faith, in that they know it is contrary to existing law and both Federal and State case authority.

In Heder v. City of Two River, Case No. 00-C-0274, 149 F. Supp.2d 677 (E.D. Wis 2001), and citing *Felder* as a foundational case, the Federal District Court analyzed the Applicability of a State Notice-of-Claim Statute to a Federal FLSA Claim. The Court stated:

> "Defendant contends that plaintiff's FLSA claim is barred because he did not file a timely notice of claim pursuant to Wis. Stat. § 893.80. This statute provides that no action may be brought against a governmental subdivision, such as a municipality, unless a claimant files a written claim within 120 days of the event giving rise to the claim. Wis. Stat. Ann. § 893.80(1)(b) (West Supp. 2000). Plaintiff filed his notice of claim in September 1999, long after the 120-day notice of claim period for any claims arising from 1997. Defendant accordingly contends that any such claims are barred.
>
> However, state procedural rules may not be used to defeat a federal right. Brown v. W. Ry. Co. of Ala., 338 U.S. 294, 296 (1949). In Felder v. Casey, 487 U.S. 131 (1988), the Supreme Court squarely held that non-compliance with the very statute at issue here, § 893.80. did not

> bar claims brought under federal law. Felder governs the present case. Congress enacted the FLSA to promote and maintain a standard of living necessary for workers' health, efficiency, and general well-being, 29 U.S.C. § 202(a), and granted workers a two-year statute of limitations (three years for willful violations), 29 U.S.C. § 255(a). Non-compliance with a state notice of claim statute does not bar FLSA claims against governmental subdivisions (or, at any rate, against municipal corporations or other governmental entities which are not arms of a state, Alden v. Maine, 527 U.S. 706, 756 (1999)). See also Mitchell v. La Barge, 684 N.Y.S.2d 10, 11 (App. Div. 1999) (holding that, under Felder, FLSA claim against municipality was not barred by New York State notice of claim statute)".

The decision of this Federal Court is directly on point as to this argument. Ms. Gibson is not required, pursuant to the *Idaho Tort Claims Act*, to ever give any notice-of-claim to Ada County prior to submitting her claim to recover monies or allege rightful offsets and credits for wages owed to her due to her employment with the Ada County Sheriff's Office. Any such suggestion is austerely contrary to law. See also Travis v. Knappenberger, Case No. CV-00-393-HU, ___ F.Supp. ___ (Or. 2000 Conner v. Schnuck Markets, Inc., 906 F.Supp. 606, 611 (Kan. 1995); Hayes v. McIntosh, 604 F.Supp. 10, 17-18 (Ind. 1984); and particularly Bar rentine v. Arkansas – Best Freight System, 450 U.S. 728, 740 (1981).

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Denial of Procedural Due Process

The Ada County Personnel System (Merit System), Ada County Code (A.C.C.), § 1-7-1 through § 1-7L-10, conferred upon Defendant, an Ada County employee, a legitimate entitlement or benefit to a property right in her employment and wages owed to her. Once Defendant attained that tenured or classified employment status with Ada County, in accordance with the Ada County Code, Defendant then had the unqualified right to an expectation in continued employment and compensation for wages owed to her, and thus an unqualified right to procedural due process concerning those property rights. Ada County and this Court have taken the obtuse position that has severely restricted, obstructed, deprived and eliminated Defendant's right to control her employment benefits, and that conduct has deprived Defendant of procedural due process, as a matter of law. See Pappas v. City of Lebanon, Civil Action No. 1:03-CV-1112, August 16, 2004 (M.D. Pa. 2004).

CONCLUSION

Defendant does believe the current state of the issues presented as a result of the September 16, 2004 order is of a significant and substantial legal concern, of great public interest, and involve a controlling question of law on the issues of employee statutory rights, privileges, protections, benefits and what is expected of an FLSA employer who remains knowingly out-of-compliance of the mandatory law, in violation of the Federal enactment and of its own County Code requirements, and then disregards its own administrative errors caused from the record-keeping violations, and disregards the pay reduction provision mandated in its own County Personnel System, and then discriminates against a loyal – never once

disciplined – employee, by the discriminatory, retaliatory, arbitrary and capricious termination of such a dedicated employee, because of the voiced attitude over the County's pay voucher errors. We are confronted with an employer who believes it is above the law and can conduct this course of conduct with impunity.

Ada County's failure to correctly cite applicable law is disturbing; it is deliberate, not just a reckless indifference to the truth. Consequently, this Court's September 16, 2004 Order does present a significant and substantial legal concern, of great public interest, and involves controlling questions of law, not only decided differently, as required by Federal law, but specifically affects issues of employee rights, privileges, protections, and Federal statutory rights of an employee, and illustrates what takes place when an FLSA employer remains knowingly out-of-compliance to mandatory law, in violation of Federal enactments and its own County Code requirements. Ada County disregards its own administrative errors caused by its record-keeping violations; it disregards the pay reduction provision mandated in its own County Personnel System, and it disregards (and argues against) the requirements of Federal law. This employer acts as though it is above the law and can conduct its course of conduct with impunity. Defendant respectfully requests the Court to enter an Order restoring the judicial means by which Defendant's may pursue her Federal statutory right, as announced within 29 U.S.C. § 216 (b), and as determined and demonstrated by case authority to this Court.

Defendant respectfully requests the Court to enter an Order approving her Motion to Appeal by Permission and seek determination from the Appellate Court concerning Defendant's due process of law, and her statutory rights to

initiate and pursue her causes of action against Ada County, due to their offensive and unlawful ongoing violations of the *Fair Labor Standards Act*, 29 U.S.C. § 201 *et seq.*

Dated This 9th day of December 2004.

s/ Vernon K. Smith
Vernon K. Smith
Attorney for Defendant/Counterclaimant

APPENDIX 18 – [GIBSON] MOTION FOR PERMISSION TO APPEAL FROM DISTRICT COURT'S INTERLOCUTORY ORDER ENTERED SEPTEMBER 16, 2004 BY JUDGE RONALD J. WILPER, FOURTH DISTRICT COURT (DOCKET NO. 31553), FILED DECEMBER 9, 2004

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Case No. CV OC 0107394D

MOTION FOR PERMISSION TO APPEAL FROM DISTRICT COURT'S INTERLOCUTORY ORDER ENTERED SEPTEMBER 16, 2004

Filed: December 9, 2004

ADA COUNTY,

Plaintiff/Counterdefendant,

v.

STACY A. GIBSON

Defendant/Counterclaimant.

COMES NOW The Defendant/Counterclaimant above-named, through counsel, Vernon K. Smith, and pursuant to Rule 12, I.A.R., does request this Court to enter an order granting Ms. Gibson permission to appeal the District Court's Interlocutory Order entered September 16, 2004, to the Idaho Supreme Court, as it appears appropriate upon the following controlling questions of law:

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1. Whether Ms. Gibson has a Federal statutory right under the *Fair Labor Standards Act* (FLSA), 29 U.S.C. § 216 (b), to initiate and assert her claims for relief against her employer, Ada County, as addressed in her Second Amended Counterclaim, and to pursue her right to recover back pay due for regular wages, overtime wages, and employment entitlements and benefits, in accordance with her protected status as a permanent and classified Ada County employee, which specifically includes her rights to sick leave, vacation pay, additional holiday pay, additional overtime pay, step increases, cost of living increases, continued medical insurance benefits, continued family coverage benefits, continued life and disability insurance, Workman's Compensation coverage, all retirement benefit funds for PERSI (representing 6% of total monthly wages) and PEBSCO (an employee contributory retirement plan), together with available training benefits, and recovery of all other benefits as a result of the inadequate wage and record-keeping procedures that caused the administrative error and overpayment of her wages into a joint checking account under the direct deposit system used by Ada County, through its Payroll Department, resulting in Ms. Gibson's mistaken receipt of funds from the County's negligence and ongoing violations of the FLSA provisions announced in 29 U.S.C. § 201 *et seq.* It was these erroneous overpayment of wages to that account, without her knowledge, that has resulted in actions taken by the Ada County Sheriff, Vaughn Killeen, to initiate malicious and capricious interrogations, threats of termination, violations of her Merit System protection and property rights, and causing Ms. Gibson to suffer a psychological workplace injury, and then, in a retaliatory and discriminatory manner, and contrary to Federal law (FLSA), Sheriff Killeen did then terminate her employment with Ada County, which has denied all efforts at exhausting any of her administrative due process remedies.

2. Whether Ms. Gibson has a Federal statutory right under the *Fair Labor Standards Act* (FLSA), 29 U.S.C. § 216 (b), to initiate and assert a claim for relief against her employer, Ada County, as addressed in her Second Amended Counterclaim, including the reinstatement of her Ada County employment, resulting from the discriminatory and retaliatory manner in which the Ada County Sheriff, Vaughn Killeen, terminated her employment with the Ada County Sheriff's Office, as a result of the inadequate and incorrect wage and record-keeping procedure that caused an administrative payroll error and overpayment of Defendant's salary into a joint checking account under the direct deposit system used by the County, resulting in Defendant's mistaken receipt of funds from the County's negligence and ongoing violations of the FLSA provisions announced in 29 U.S.C. § 201 *et seq*.

3. Whether Ms. Gibson has a Federal statutory right under the *Fair Labor Standards Act* (FLSA), 29 U.S.C. § 216 (b), to initiate and assert a claim for relief against her employer, Ada County, as addressed in her Second Amended Counterclaim, including recovery of liquidated damages equal to two (2) times the recovery of back pay and benefits as addressed in Paragraphs No. 1 & 2 above.

4. Whether Ms. Gibson has a Federal statutory right under the *Fair Labor Standards Act* (FLSA), 29 U.S.C. § 216 (b), to initiate and assert a claim for relief against her employer, Ada County, as addressed in her Second Amended Counterclaim, including recovery of costs and attorney fees associated with her litigation in this matter for the reinstatement of her employment, and recovery of back pay and benefits as addressed in Paragraphs No. 1 & 2 above.

5. Whether Ms. Gibson, as a prerequisite to initiating her Federal statutory right under the *Fair Labor Standards Act* (FLSA), 29 U.S.C. § 216 (b), is required to submit a "notice-of-claim" to Ada County pursuant to the *Idaho Tort Claims Act*, § 6-906, as a condition precedent to initiating this claim to enforce her federally established and protected statutory rights to unconditional relief as addressed in her Second Amended Counterclaim, and referenced in Paragraphs No. 1, 2, 3 & 4 above.

6. Whether the lower court obstructed and deprived Ms. Gibson the constitutional right to procedural due process concerning her employment property rights and the wages owed to her by Ada County, when the lower court denied access to judicial remedies concerning her Federal statutory "right of action" pursuant to the *Fair Labor Standards Act*, 29 U.S.C. § 201 *et seq*.

Ms. Gibson does contend the subject matter in this dispute does involve controlling questions of law, of great public interest, with a potential of affecting any one of the many employees of Ada County, and the action of this District Court to preclude this Defendant from properly asserting her "right of action", affirmative defenses and causes of action addressed in her Second Amended Counterclaim, is contrary to existing Federal and State case law.

Said Defendant does request this Court enter an order granting a permissive appeal, based upon the reasons, concerns and case authorities set forth in Defendant's Memorandum, submitted in support of this Motion, and filed contemporaneously herewith. Pursuant to Rule 12, I.A.R., Defendant requests expedited oral argument on this Motion.

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Dated This 9th day of December 2004.

s/ Vernon K. Smith
Vernon K. Smith
Attorney for Defendant/Counterclaimant

APPENDIX 19 – ORDER DENYING [GIBSON] MOTION TO DISMISS AND GRANTING [ADA COUNTY] MOTION TO DISMISS ENTERED BY JUDGE RONALD J. WILPER, FOURTH DISTRICT COURT (DOCKET NO. 31553), FILED SEPTEMBER 16, 2004

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Case No. CV OC 0107394D

ORDER DENYING DEFENDANT'S MOTION TO DISMISS AND GRANTING PLAINTIFF'S MOTION TO DISMISS

Filed: September 16, 2004

ADA COUNTY,

Plaintiff,

v.

STACY A. GIBSON

Defendant.

On July 15, 2004, the Defendant in this action moved to dismiss Plaintiff Ada County's complaint based on a lack of subject matter jurisdiction as required by Idaho Rule of Civil Procedure 12(b)(1). On August 9, 2004, the Court heard oral arguments regarding the motion and took the matter under advisement. On February 23, 2004, the Plaintiff moved to dismiss Defendant Stacy Gibson's Second Amended Counterclaim based on the failure of Defendant to state a cause

of action upon which relief can be granted pursuant Idaho Rule of Civil Procedure 12(b)(6) and on the ground that other actions between these same parties are pending or have been litigated with respect to the counterclaim. The Court heard oral argument on this motion on May 24, 2004.

I. BACKGROUND

This action began as a claim by Ada County for return of overpaid compensation. Through her counterclaim, Gibson seeks to turn this into an action to recover under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 *et seq*.

Stacy Gibson was a records clerk for the Ada County Sheriff's Office. She eventually received permanent status and became a "classified employee." Once "classified," she could only be dismissed for cause. She then was promoted to Jail Technician II. Gibson was supposed to be paid about $1,500 per month. She actually received about $3000 per month for several months, amounting to $8500 in over compensation. Ada County seeks to recover that amount and Gibson counterclaims to offset that amount or otherwise she is owed other money.

Gibson contends she engaged in no wrongful conduct. Gibson also asserts various acts of wrongful conduct were committed by many Ada County employees and alleges violations of the FLSA.

II. ANALYSIS

A. DEFENDANTS MOTION TO DISMISS PLAINTIFF' CLAIM

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Gibson argues that the Court has no subject matter jurisdiction over this matter because Ada County must first exhaust administrative remedies before any judicial action can be taken. She argues that wage overpayment and the right to reimbursement resulting from wage overpayment are administrative actions that must first be ruled upon by an administrative agency.

Gibson's argument is without merit. Nowhere does the Ada County Code (A.C.C.) even address the situation presented in this case. § 1-7C-6 of the A.C.C. provides that an employee's pay may be reduced for reasons including overpayments made due to administrative error. However this section is permissive, not mandatory. Gibson has been fired and this action was initiated after she was terminated. There is no longer an employee-employer relationship. Ada County did not attempt to recover any overpayments until after Gibson was fired.

Gibson further argues that since there has been no final agency order, Ada County cannot proceed on its claim because the Idaho Administrative Procedures Act (IDAPA), Idaho Code § 67-5201 *et seq*, states that "[a] person is not entitled to judicial review of an agency action until that person has exhausted all administrative remedies required in this chapter." IDAPA §67-52719(1).

Gibson's argument fails because Ada County is not seeking judicial review of an agency decision. The agency decision was to terminate Gibson, not to collect any overpayments. This restitution action stems from her employment, but it is a simple common law action.

In addition, the decision regarding Gibson's termination is final. In Gibson v. Ada County Sheriff's Department, CV OC 0305850D, (2003), the Court found that there is no statutory "or constitutional authority under Idaho law that would allow the Board of County Commissioners to review the personnel decisions of other elected County officers." Thus, the Sheriff's decision to terminate Gibson is a final decision. It cannot be reviewed in the manner Gibson requests.

Therefore, the Court DENIES Defendant's Motion to Dismiss.

B. PLAINTIFF'S MOTION TO DISMISS DEFENDANT'S SECOND AMENDED COUNTERCLAIM

Ada County moves to dismiss Gibson's Second Amended Counterclaim based on the grounds that the Court previously barred Gibson from bringing FLSA claims and that Gibson's counterclaim fails to comply with the Idaho Tort Claims ACT (ITCA) § 6-901 *et seq.* Ada County argues that because Gibson did not file her claim within 180 days from the date on which it arose, the claim is barred pursuant to §6-906 and §6-908.

1. Gibson is Not Entitled to Bring Fair Labor Standards Act Claims

Gibson alleges fifteen (15) counts against Ada County in her Second Amended Counterclaim. Each of these counts alleges violations of the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 *et seq.*

The Court has already ruled that Gibson cannot bring these claims. Even Gibson acknowledges that at a hearing on

January 23, 2003, the Court stated: "The Court will not allow the defendant, or rather Ms. Gibson, to amend her complaint to allege a violation of the Fair Labor Standards Act based on the facts of this controversy, based on the Court's previous ruling that the Fair Labor Standards Act does not apply."

On February 19, 2003, the Court entered an order denying Gibson the right to amend her counterclaim. On April 18, 2003, the Court entered an order denying Gibson's Motion to reconsider the February 19, 2003 order.

On May 2, 2003, Gibson filed a Motion for Permission to Appeal the District Court's Interlocutory Order of February 19, 2003. On June 11, 2003, the Court allowed Gibson to file an amended counterclaim as a matter of right because no answer had yet been filed as to her original claim, pursuant to IRCP 15. Gibson argues that the Court intended by it's ruling to allow her to resurrect the [FSLA] claims. Such was not the case. Therefore the Court finds that because all of Gibson's [FSLA] claims are invalid, Plaintiff's Motion to Dismiss with respect to those claims is GRANTED.

2. Gibson's Tort Claims are Barred by Idaho Law

All of Gibson's causes of action involved FLSA claims and FLSA relief. However, Gibson's counterclaims are vast and intertwined and can be construed to allege torts as well as FLSA violations. Ada County argues that Gibson's tort claims are barred under Idaho law because she did not timely file a notice of her claims. Idaho Code §6-902 defines a claim.

> "Claim" means any written demand to recover money damages from a governmental entity or its employee which any person is legally entitled to recover under

> this act as compensation for the negligent or otherwise wrongful act or omission or a governmental entity or its employee when action within the course or scope of his employment.

Idaho Code §6-906 states that:

> All claims against a political subdivision arising under the provisions of this act and all claims against an employee of a political subdivision for any act or omission of the employee within the course or scope of his employment shall be presented to and filed with the clerk or secretary of the political subdivision within one hundred eighty (180) days from the date the claim arose or reasonably should have been discovered, whichever is later.

Gibson's failure to file notice of her claims bars her cause of action, pursuant to Idaho Code, § 6-908, which states that "[no] claim or action shall be allowed against a governmental entity or its employee unless the claim has been presented and filed within the time limits prescribed by this act."

Therefore, the Court finds that with respect to Gibson's tort claims Plaintiff's Motion to Dismiss is GRANTED.

III. CONCLUSION

Based on the foregoing, the Court hereby DENIES Defendant's Motion to Dismiss Plaintiff's claim. Because all of Gibson's claims are barred by either statute or the Court's rulings, the Court hereby GRANTS Plaintiff's Motion to Dismiss Defendant's Second Amended Counterclaim.

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IT IS SO ORDERED.

DATED this 16th day of Sept., 2004.

s/ Ronald J. Wilper
Ronald J. Wilper
DISTRICT JUDGE

APPENDIX 20 – ORDER ON RENEWED MOTION FOR RECONSIDERATION AND FINAL ORDER DENYING PETITION FOR JUDICIAL REVIEW ENTERED BY JUDGE JOEL HORTON, FOURTH DISTRICT COURT (DOCKET NO. 30976), FILED JUNE 17, 2004

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Case No. CV-OC-03-05850*D

ORDER ON RENEWED MOTION FOR RECONSIDERATION AND FINAL ORDER DENYING PETITION FOR JUDICIAL REVIEW

Filed: June 17, 2004

STACY A. GIBSON,

Petitioner,

v.

ADA COUNTY, a political subdivision and governmental agency of the State of Idaho AND THE ADA COUNTY SHERIFF'S OFFICE,

Respondents.

The history of the case requires more than a brief discussion to place this Court's Orders in context. Petitioner filed the instant "petition for judicial review" on July 30, 2003. Petitioner's motion for remand of the matter to the Ada County Commissioners for creation of a previously non-existing

agency record came before the Hon. D. Duff McKee for hearing on October 15, 2003. At the conclusion of the hearing, the motion was denied. The minutes reflect Judge McKee's conclusion that a petition for judicial review as an inappropriate mechanism to pursue Petitioner's claim. The minutes also suggest that Judge McKee denied leave to seek an interlocutory appeal of his ruling, although no written order to this effect was entered.

Rather than enter a final order, Judge McKee ruled that Petitioner should be able to amend the petition to state other grounds, arising out of the common law, upon which relief might be granted. Judge McKee directed counsel for Petitioner to prepare a draft order to be reviewed by Respondents' attorney.

Rather than preparing the order as directed, Petitioner requested that Judge McKee reconsider his previous ruling. That motion was denied by order dated February 27, 2004. On the same date, Judge McKee entered an interlocutory order drafted by the attorney for Respondents. That interlocutory order denied the petition for judicial review and granted Petitioner leave to amend the petition within thirty (30) days to state common-law grounds for relief.

Petitioner responded on March 12, 2004, with a motion for permissive appeal from the interlocutory order of February 27, 2004. On March 19, 2004, Petitioner filed an amended motion for permissive appeal. Judge McKee denied the motion for interlocutory appeal on April 8, 2004.

Some time between April 12, 2004 and April 22, 2004, the Hon. Darla Williamson, Administrative District Judge for the Fourth Judicial District, directed that this action be reassigned

to an active district judge. On April 22, 2004, this action was assigned to the undersigned district judge.

Prior to the order of reassignment, on March 29, 2004, Petitioner filed a motion to amend the petition to seek peremptory and alternative writs of mandamus. On May 14, 2004, Petitioner filed a renewed motion to reconsider the order denying the petition for judicial review.

The motion to amend the petition came before the Court for hearing on June 16, 2004. At that hearing, Petitioner's attorney reiterated the desire to pursue and appeal of Judge McKee's earlier order of February 27, 2004. The Court indicated that although the renewed motion for reconsideration of Judge McKee's the interlocutory order of February 27, 2004, was not before the Court for hearing, the motion would not be granted. In order to expedite the appeal from Judge McKee's decision, Petitioner withdrew her motion to amend the petition to state common law theories upon which relief might be granted.

Accordingly, for the foregoing reasons, Petitioner's renewed motion for reconsideration shall be, and hereby is, denied. Petitioner's motion to withdraw her motion to amend shall be and hereby is, granted that motion is withdrawn. As Petitioner does not seek to exercise the leave to amend granted by the interlocutory order of February 27, 2004, that order shall be, and hereby is, deemed to be a final order from which an appeal may be taken.

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IT IS SO ORDERED.

DATED this 16th day of June, 2004.

s/ Joel D. Horton
JOEL D. HORTON
District Judge

APPENDIX 21 – ORDER OF THE IDAHO SUPREME COURT, ERRONEOUSLY RULING THE FEBRUARY 27, 2004 INTERLOCUTORY ORDER WAS "FINAL" ORDER, AND DISMISSING PERMISSIVE APPEAL FOR BEING UNTIMELY, FILED MAY 26, 2004

IN THE SUPREME COURT
OF THE STATE OF IDAHO

ORDER

NO. 99512
Ref. No. 04S-129

Filed: May 26, 2004

IN THE MATTER OF THE PETITIONER'S MOTION FOR PERMISSION TO APPEAL FROM DISTRICT COURT'S INTERLOCUTORY ORDER ENTERED FEBRUARY 27, 2004

STACY A. GIBSON,

Petitioner,

v.

ADA COUNTY, a political subdivision and governmental agency of the State of Idaho and the ADA COUNTY SHERIFF'S OFFICE,

Respondents.

A MOTION FOR PERMISSION TO APPEAL FROM DISTRICT COURT'S INTERLOCUTORY ORDER ENTERED FEBRUARY 27, 2004 with attachments was filed

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by Petitioner April 22, 2004. An OBJECTION TO PETITIONER'S MOTION FOR PERMISSION TO APPEAL, which contained a request for attorney fees, was filed was filed by Respondents May 5, 2004 to which a RESPONSE with attachments was filed by Petitioner May 14, 2004 and an OBJECTION TO PETITIONER'S RESPONSE was filed by Respondents May 21, 2004. The Court being full advised; therefore, after due consideration,

IT IS HEREBY ORDERED that the MOTION FOR PERMISSION TO APPEAL FROM DISTRICT COURT'S INTERLOCUTORY ORDER ENTERED FEBRUARY 27, 2004 be, and herby is, DISMISSED as it is from a final order and is not timely.

IT IS FURTHER ORDERED that Respondents' request for attorney fees be, and hereby is, DENIED.

DATED this 26th day of May, 2004

By Order of the Supreme Court

s/ Frederick C. Lyon
Frederick C. Lyon, Clerk

cc: Counsel of Record

APPENDIX 22 – NOTICE OF REASSIGNMENT, FILED APRIL 22, 2004

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Case No. CVOC0305850D

NOTICE OF REASSIGNMENT

Filed: April 22, 2004

STACY A. GIBSON,

Plaintiff,

v.

ADA COUNTY AND ADA COUNTY SHERIFF'S OFFICE,

Defendant.

NOTICE IS HEREBY GIVEN That the above-entitled case has been reassigned to the Honorable JOEL D. HORTON.

Dated this 22 day of APRIL 2004.

J. David Navarro
Clerk of the District Court
ADA County, Idaho

By: */s B. Frankl*
Deputy Clerk

APPENDIX 23 – ORDER DENYING PETITION FOR JUDICIAL REVIEW AND MOTION TO REMAND CASE ENTERED BY JUDGE D. DUFF MCKEE, FOURTH DISTRICT COURT (DOCKET NO. 30976) FILED FEBRUARY 27, 2004

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Case No. CV OC 0305850D

ORDER DENYING PETITION FOR JUDICIAL REVIEW AND MOTION TO REMAND CASE

Filed: February 27, 2004

STACY A. GIBSON,

Petitioner,

v.

ADA COUNTY, a political subdivision and governmental agency of the State of Idaho AND THE ADA COUNTY SHERIFF'S OFFICE,

Respondents.

The above matter having come on for hearing before the Court on the 15th day of October 2003, and Petitioner appearing through her attorney, and Respondents appearing through their attorney, and all required notices having been given and the Court having heard the arguments presented and having reviewed the records and documents on file herein, and good cause appearing,

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THE COURT HEREBY FINDS THAT:

1. On or about June 4, 2003, Petitioner submitted a Petition for Hearing with the Ada County Board of Commissioners regarding the termination of Petitioner's employment with the Ada County Sheriff's Office.

2. The Ada County Board of Commissioners denied said Petition For Hearing on the grounds that there is no process by which a Board of County Commissioners may review an employment decision of another elected county official.

3. Petitioner then filed a Petition for Judicial Review with this Court on July 30, 2003, regarding the Ada County Board of Commissioners denial of the Petition for Hearing.

4. On August 13, 2003, Petitioner subsequently filed a Motion to Remand Case to the Ada County Board of Commissioners for the purposes of eliciting an additional agency record in this matter.

5. The existing agency record is sufficient and no remand is necessary as the matter at issue in this case is a question of law.

6. Pursuant to Rule 84, I.R.C.P., a petition for judicial review will only lie if permitted by statute.

7. There exists no statute or constitutional authority under Idaho law allowing a Board of County Commissioners to review the personnel decisions of other elected County officers

THEREFORE, IT IS HEREBY ORDERED:

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1. Petitioner's Motion to Remand Case is hereby denied.

2. Petitioner's Petition for Judicial Review is denied, provided, however, that Petitioner shall have leave to amend this action within thirty (30) days of the date of this Order to make common law claims, if applicable.

ORDERED this 27th day of Feb., 2004.

s/ D. Duff McKee
D. Duff McKee
District Judge

APPENDIX 24[9] – MEMORANDUM [HISTORICAL ANALYSIS OF ADA COUNTY MERIT SYSTEM] IN SUPPORT OF MOTION TO RECONSIDER INTERLOCUTORY ORDER CONDITIONALLY DENYING AND DISMISSING PETITION FOR JUDICIAL REVIEW, WITH LEAVE TO AMEND, LODGED JANUARY 30, 2004

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Case No. CVOC 0305850D

MEMORANDUM IN SUPPORT OF MOTION TO RECONSIDER INTERLOCUTORY ORDER CONDITIONALLY DENYING AND DISMISSING PETITION FOR JUDICIAL REVIEW, WITH LEAVE TO AMEND THE PLEADINGS TO INCLUDE A COMMON LAW REMEDY

Filed: January 30, 2004

STACY A. GIBSON,

Petitioner,

v.

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[9] Due to the size of Appendix 23 (the memorandum is 82 pages, and includes 33 exhibits (262 pages)), it has only been summarized here. Upon request from the Court, Petitioner's counsel will supply the complete document if required.

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ADA COUNTY, a political subdivision and governmental agency of the State of Idaho and the ADA COUNTY SHERIFF'S OFFICE,

Respondents.

Petitioner's counsel prepared that memorandum in an effort to apprise the lower district court of the historical purview as to how and why the Ada County Personnel System was developed and enacted, as the Merit System of Employment, and to demonstrate the County's necessity in making the various amendments to that Merit System under developing Due Process Clause mandates so the County, as a public employer, would come into compliance with the recognition and evolution of developing Federal Law regarding the constitutional due process rights and guarantees of permanent classified public employees.

That memorandum provided the lower district court an extensive detailed accounting analysis of the County's enactment of the Ada County Personnel System, including amendments made to the original Ordinance No. 60, dated January 3, 1975, created by the Board of Ada County Commissioners for employees of the Ada County Sheriff's Office.

As part of the evolution-compliance process, on December 10, 1980, the Ada County Board of Commissioners adopted Ordinance No. 110, since Public Law 96-170 had been enacted December 29, 1979 (involving Title 42, U.S.C. § 1983), and created modifications to the Federal Civil Rights legislation as a comprehensive, remedial legislation for the deprivation of Federal constitutional and statutory rights. Consequently, the

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County Commissioners adopted said Ordinance No. 110, establishing a personnel system for all County employees. The Ordinance was published January 9, 1981, and sought to protect Ada County employees during grievance and appeal procedures. That was Ada County's first attempt to alleviate the "finality" of an employment termination imposed by an elected official, and correct the County's structured denial of due process, under color of law.

From February 2, 1983 through January 21, 1985, the Ada County Commissioners undertook to adopt eighteen (18) amendments to Ordinance No. 110. Those amendments were additions and deletions, and involved probation and probationary periods, permanent status, compensation and classification, dismissal and disciplinary actions, vacation, definitions, war veterans, sick leave, nepotism, leave of absence with pay, exempt employees, overtime, standards of conduct, and the complete removal and abandonment of the obsolete "finality" concept.

Ordinance No. 141 was adopted by the Ada County Commissioners on August 29, 1985, which repealed or modified sections of the County Personnel (Merit) System. Those changes included an attempt by the County (a public employer) to become compliant with the mandatory provisions and requirements concerning issues with the *Fair Labor Standards Act*, Title 29, U.S.C. § 201 *et seq.* (especially overtime).

Further Ordinances (No. 157, No. 179, and No. 182) were later adopted, amending definitions, compensation and classification language, and removing redundant language of Chapter 7 of the County Personnel System.

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On May 24, 1995, the Ada County Commissioners repealed the entire language found in § 1-7C-1, "Allocation of Pay Grades to Classes", and replaced it with a new paragraph entitled "Compensation", attempting to address the concerns and mandates of FLSA. The new paragraph became stated as follows:

> § 1-7C-1: "COMPENSATION: Notwithstanding any other Ada County Code provisions, department policy provisions, handbook provisions, letters, oral representations, or any other representations to the contrary, all compensation provided to all Ada County employees shall be in compliance with applicable provisions of the Fair Labor Standards Act (FLSA)." (Emphasis added).

On May 24, 1995, the Ada County Commissioners also adopted Ordinance No. 293, adding a new chapter Fourteen, designed to provide the County Commissioners a means to administratively review certain matters by hearing, receive evidence, and issue written decisions. This hearing process in conjunction with Idaho Code, § 67-2345, was the "method" the Idaho Supreme Court had expected Petitioner to utilize in pursuing her administrative remedies with Ada County before proceeding to the Fourth District Court. (See *Gibson v. Ada County Sheriff's Department*, 139 Idaho 5, 8, 72 P.3d 845 (2003).

Ordinance No. 293 (also called Chapter 14), creating the due process hearing required by law from a variety of enactments, stated as follows:

> § 1-14-1: "Purpose: The purpose of this chapter shall be to provide a procedure by which the Board

shall conduct hearings in land use, personnel, medical indigency, and other matters which, by federal, state, or county law, require the receipt of evidence, whether testimony, documents, or otherwise, and a response from the Board in the form of a written decision based on the record. (Emphasis added).

APPENDIX 25 – SUPPLEMENTAL ORDER ENTERED BY JUDGE RONALD J. WILPER, FOURTH DISTRICT COURT (DOCKET NO. 31553), FILED JANUARY 5, 2004

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Case No. CVOC01-07394D

SUPPLEMENTAL ORDER

Filed: January 5, 2004

ADA COUNTY,

Plaintiff/Counterdefendant,

vs.

STACY A. GIBSON,

Defendant/Counterclaimant,

On 6/11/03 the court ruled that the Counterclaimant has a right to file an amended counterclaim because the plaintiff had not filed a reply to the original counterclaim.

A status conference was held in chambers on 12/30/03 with counsel for both parties present. It appears that the defendant/counterclaimant has been waiting for the disposition of a related case currently pending the appellate court The court has the inherent power to control litigation. The court

will allow the defendant/counterclaimant 30 days from the date of this order to file the proposed amended counterclaim.

IT IS SO ORDERED

1-3-04

/s/ Ronald J. Wilper
Ronald J. Wilper
District Judge

APPENDIX 26 – ORDER OF THE IDAHO SUPREME COURT DENYING PETITION FOR WRIT(S) OF MANDAMUS (DOCKET NO. 30976), FILED OCTOBER 17, 2003

IN THE SUPREME COURT
OF THE STATE OF IDAHO

ORDER DENYING PETITION
FOR WRIT(S) OF MANDAMUS

NO. 29968
Ref. No. 03S-246

Filed: October 17,2003

IN THE MATTER OF THE PETITION
FOR WRIT(S) OF MANDAMUS

STACY A. GIBSON,

Petitioner,

v.

ADA COUNTY, a political subdivision and governmental agency of the State of Idaho and the ADA COUNTY SHERIFF'S OFFICE,

Respondents.

A PETITION FOR WRIT(S) OF MANDAMUS with attachments and supporting MEMORANDUM with attachments was filed by Petitioner September 5, 2003. The Court is fully advised; therefore, after due consideration, IT IS HEREBY ORDERED that the PETITION FOR WRIT(S) OF MANDAMUS be, and hereby is, DENIED.

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DATED this 17th day of October 2003.

By Order of the Supreme Court

s/ Frederick C. Lyon
Frederick C. Lyon, Clerk

cc: Counsel of Record

APPENDIX 27 – MEMORANDUM IN SUPPORT OF PETITION FOR WRIT(S) OF MANDAMUS

IN THE SUPREME COURT OF THE STATE OF IDAHO

MEMORANDUM IN SUPPORT OF PETITION FOR WRIT(S) OF MANDAMUS

Filed: September 5, 2003

STACY A. GIBSON,

Petitioner,

v.

ADA COUNTY, a political subdivision and governmental agency of the State of Idaho and the ADA COUNTY SHERIFF'S OFFICE,

Respondents.

HISTORY OF UNDERLYING EVENTS

Over four (4) years ago, on July 19, 1999, Merrily Wilfong, Payroll Technician, Ada County Payroll Department, sent a facsimile transmission to the Budget Director of the Ada County Sheriff's Office, Kelli Bolicek, therein providing a detailed accounting of nine (9) Sheriff's Office employees who she believed were shorted pay from October 1998 through June 1999. See Exhibit 1. Deputy Gibson was one (1) of those nine (9) employees Payroll thought was owed back pay for overtime wages. That event confirmed there was a record-keeping problem in the payroll system of Ada County. The County then determined their own Payroll Department had in fact created and perpetuated an administrative error of Ms.

Gibson's wage and benefit records (a further acknowledgement of ongoing County FLSA violations), which error had in fact resulted in the County's disbursing overpayments to Ms. Gibson's joint bank account with her husband, through Ada County's direct deposit program, causing a mistaken receipt of funds into the joint account from the County's negligence and violations of the *Fair Labor Standards Act* (FLSA), 29 U.S.C. § 211 (c). This combination of misfortunate events caused by the Payroll Department personnel was then escalated by Ada County Sheriff, Vaughn Killeen, by his inappropriate and unlawful basis to discriminate, retaliate and wrongfully terminate Deputy Gibson, who had never been written up or ever disciplined, and had always been a loyal County employee, but occurred because of the erroneous wage and record-keeping process of the governmental agency and their Ada County Payroll Department. The underlying cause of this error was the flawed accounting process known to be in use back in 1998, and that flawed system was kept in effect by the County until January 10, 2002, when the events of this ongoing state of non-compliance was made a major issue and became of concern, and that caused administrative efforts to be taken to address need for some "level of" compliance with the Federal mandates.

It has become well known that prior to January 10, 2002, Ada County, as an FLSA employer, had not been in compliance with the mandatory provisions and conditions of FLSA in a variety of ways, and that fact was also pronounced in the Affidavit of Sharon M. Ullman (Exhibit 2, attached hereto) and the letter of February 12, 2001, containing five (5) options and five (5) attachments submitted by Theodore E. Argyle, Ada County Chief Deputy Attorney, Civil Division, to the Ada County Board of Commissioners (Exhibit 3, attached hereto). The

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Affidavit of Sharon Ullman, former Ada County Commissioner, and the communications from County officials, address the ongoing state of non-compliance and Mr. Argyle's list of five (5) options to pursue some level of performance with the law. These factors and documents have been made available to Ms. Gibson and her counsel, and are presented to this Court for background awareness of the history of these errors, and no fault of any employee. The Court will note the fifth option proposed by the County Legal Department was to do nothing, the effect of which was to allow the state of non-compliance to continue, demonstrating bad faith and ongoing County misconduct in the manner in which their obligation and duty is perceived as to the mandatory compliance standards with the Federal law. This disregard has added much to the concern over the arbitrary and capricious behavior of various officials in Ada County with the power to exercise certain authority.

Even though the Sheriff knew someone in the Payroll Department was responsible for creating and perpetuating this administrative error over Deputy Gibson's payments, and well knowing Ada County was an FLSA employer, required to comply with all provisions of the *Act*, Sheriff Killeen nonetheless chose to accuse Deputy Stacy Gibson of some element of misconduct, and did then take action by his effort to capriciously discriminate and retaliate against Deputy Gibson by instructing two (2) detectives to sequester and interrogate her on July 20, 1999.

On July 20, 1999, the day after the error was discovered, Ms. Gibson received a phone call from Detective Arville Glenn, requesting she report to the Sheriff's Office. She had been recovering from surgery, and she thought they had another special assignment for her, as they did with her on a

regular basis, creating much of her overtime benefits. When she arrived at the Ada County Sheriff's Office, these two (2) detectives of the Ada County Sheriff's Office subjected Ms. Gibson to two and one-half (2 ½) hours of confrontational interrogation.

During that interrogation process, those detectives called her a liar, accused Ms. Gibson of unlawful activities, threatened her with felony criminal charges and jail time, yet they knew before they interrogated her the substance of the issue involved was an administrative error in County Payroll, not a criminal issue, and also knew the error was created solely by the Payroll Department. Furthermore, they should have known the mistaken receipt of monies by Ms. Gibson in that joint account was a record-keeping payroll issue, and the employer was solely responsible for the disbursements, not the employee, and was controlled solely by the Federal *Fair Labor Standards Act* (FLSA), Title 29 U.S.C. § 201 *et seq.* Under FLSA, the employer is not allowed to transfer any record-keeping responsibilities to an employee. If the employer ever chooses to do so, he does so at his own risk and accounting peril.

The Sheriff, in the course of his capricious conduct, then placed Ms. Gibson on administrative leave, and later on in August 1999, placed her on administrative leave without pay, done in a manner that constituted another violation of the County Personnel System. Sheriff Killeen knew Ada County Payroll personnel had created the error, not Ms. Gibson; and knew (or should have known) no one, could transfer any of the record-keeping requirements of an FLSA employer to any employee. Despite that fact, the Sheriff blamed this employee for what happened and thereby tried to transfer the consequential effects of those FLSA record-keeping

responsibilities and violations to Ms. Gibson, and used that figment of transfer as his basis to accuse Ms. Gibson of wrongdoing, and claimed she had committed acts to justify termination, such as grand theft, and disgrace to the office, and used that flawed logic to constitute cause to fire her under Ada County Code, § 1-7G-3A (5) and § 1-7G-3A (20), and § 9.04 of the Ada County Sheriff's Office Policy Manual. (See attached definitions of those sections). When these proactive events occurred and his course of action taken against Ms. Gibson, it resulted in an exploitation of her protected employment and property rights, and did cause a discriminatory retaliation against Ms. Gibson, another violation of 29 U.S.C. § 215 (a)(3).

Of interest, the criterion used against Ms. Gibson by the Sheriff was her endorsement of the County pay voucher, which has since been discontinued by the County. Deputy Gibson, like all County employees, was required to sign a County pay voucher. When Stacy signed the pay voucher(s), she thought she was authorizing the County to pay her base salary of $1,550.00. That specific amount is disclosed and shown directly within the script on the pay voucher. It was her belief she was authorizing Payroll to pay also whatever was their accounting of her accumulating overtime. Ms. Gibson understood the voucher had been inaccurate from the first pay period of her employment and the first wage payment. She was soon made to understand her signature, regardless of the voucher content, would be needed to authorize Payroll to pay the wages due her.

Ada County Payroll Department disbursed the only wages to any and all County employees. The Sheriff's Office does not pay any County employees. The Ada County payroll Department had programmed their payroll system (computer

system) to determine what wage disbursement was to be made to any given County employee through the County's Direct Deposit Program. Approximately one (1) week prior to any monthly wage disbursement, the Payroll Department printed out a pay voucher and delivered them to any given County Department, including the Sheriff's Office. Whether the amounts indicated on a pay voucher were correct or incorrect, before any employee, such as Ms. Gibson, could receive any disbursement of any wages, the employee had to sign the voucher, as a verbal notification was given by their supervisor (and Payroll Department personnel), that if they wanted to get paid, they shall sign a pay voucher, regardless whether the pay voucher was incorrect, or the subsequent disbursement of wages was correct. If the pay voucher (correct or incorrect) was not signed by the County employee, County Payroll would not disburse a wage payment to that employee.

The Sheriff's Office was not set up in the system to handle payroll, and could not disburse any wage or salary to any employee. Therefore, the Ada County Payroll Department had the exclusive, statutory duty to maintain *Fair Labor Standards Act* (FLSA) compliance and keep records and pay out all wages justly due to the County employees, which included all employees with the Sheriff's Office.

Both Kelli Bolicek, Budget Director for the Ada County Sheriff's Office, and Marshia Eiguren, Ada County Payroll Department Technician, have confirmed the Payroll Department did in fact create and perpetuate the administrative payroll error (because of the record-keeping system), and that event they confirmed caused Stacy Gibson's overpayment and mistaken receipt of money. Federal law would classify that event to be the result of an FLSA violation. Their acknowledgement described how their Payroll Technician

incorrectly programmed the County payroll system (computer) to disburse an incorrect amount of wage to Ms. Gibson's bank account because of the inaccurate wage information entered by the Technician into the computer, essentially commanding the computer payroll system to automatically and monthly, disburse an incorrect wage calculated on Ms. Gibson's old position, and also a wage calculated on her employment position at the Jail Facility. Once the County determined the error, Payroll Department personnel manually went into the County computer payroll system and deleted the incorrect wage information and halted the incorrect disbursements. These County personnel addressed the specific steps and precautions then taken to prevent any future administrative errors (and FLSA violations) of this nature.

It has not yet been accurately disclosed how long Ada County has been *out-of-compliance* with the *Fair Labor Standards Act*, but according to public records, the County has officially recognized its ongoing state of FLSA non-compliance, and for that reason, action was taken, effective *circa* January 10, 2002, to bring it into a level of compliance, and the County did make major changes in the method and means by which the County Departments maintained employee wage records, and how record-keeping and disbursements are to be accomplished, including the long overdue removal of the mandatory signature on the "pay voucher" or "claim form", and effective *circa* January 10, 2002, County employees are *no longer* required to *sign* any "*pay voucher*" or "*claim form*".

Shortly after July 20, 1999, Vernon K. Smith, Attorney At Law, was requested to be Ms. Gibson's legal representative concerning any allegations of criminal conduct as Sheriff Killeen had threatened, and any false charges he might cause to be filed against her.

Approximately a week later, on Wednesday, July 28, 1999, Mr. Smith received a phone call from Mr. R. Monte MacConnell, acting for the Sheriff as the Sheriff's Legal Advisor. Mr. MacConnell stated to Mr. Smith the Sheriff wanted Deputy Gibson terminated, and if Ms. Gibson would not resign from the Sheriff's Office, she would be processed with felony charges for grand theft and then terminated.

Of concern, according to Idaho law, in Quiring v. Quiring, 130 Idaho 560, 944 P.2d 695 (1997), the Idaho Supreme Court expressly stated that:

> "Obtaining the transfer of property by a threat of arrest or exposure to hatred, contempt or ridicule is theft by extortion and violates I.C. § 18-2403";
>
> "A person obtains property by extortion when he compels or induces another person to deliver such property to himself or to a third person by means of instilling in him a fear that, if the property is not so delivered, the actor or another will: . . . (4) Accuse some person of a crime or cause criminal charges to be instituted against him; or (5) Expose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt or ridicule. . . .;
>
> I.C. § 18-2403 (2)(e).

Additionally, the Supreme Court has stated:

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> "It makes no difference whether the threat of arrest was a lawful or unlawful arrest. *Wilbur v. Blanchard*, 22 Idaho 517, 519, 126 P. 1069, 1071 (1912).".

Mr. MacConnell conveyed his threat as perceived, solely for the purpose of to appropriating Ms. Gibson's property right of tenured employment, as that was the substance of his communication when he called Mr. Smith's office on July 28, 1999. Mr. Smith was required to be very specific as to what Mr. MacConnell's statement and proposal was, and later was told by Ms. Gibson to incorporate the substance of what happened into an Affidavit, to preserve the account of that communication. Mr. Smith believed it was his duty to convey the message to Ms. Gibson just as it was specifically presented to him, with the details of that conversation and the consequences if she refused to resign, and the agony and consequences to be avoided if she cooperated with the Sheriff's demands. Attached as Exhibit 4, is a copy of Mr. Smith's Affidavit for the Court's reference.

Shortly after that communication, and the threat being conveyed to Ms. Gibson, the proposal was unconditionally rejected, and Ms. Gibson became informed thereafter that on August 9, 1999, Greg H. Bower, the Ada County Prosecutor, at Mr. MacConnell's request, did send a letter to Mr. John Christensen, Chief Criminal Prosecutor in Canyon County, Idaho, giving him authorization "to file charges in this case…", and therein stating "I will have you appointed as special prosecutor".

This communication was later discovered, and found to be without legal cause or statutory basis, and later was confirmed to be issued contrary to statute. Mr. Bower, at Mr.

MacConnell's request, was seeking the prosecution of Ms. Gibson without any factual basis. Furthermore, such conduct of prosecutorial appointment was not authorized by Idaho Code §31-2603 (a); that such letter suggesting "authorization", was undertaken solely for the benefit of the Sheriff, designed to carry forward the ramifications of the threat communicated by Mr. MacConnell, as it was his sole intent to instill a fear of criminal charges to frighten Ms. Gibson into resigning, which was perceived by Petitioner to be more of their arbitrary and discriminatory behavior, pursued solely for their vengeful and reactionary purpose, and though felt such malicious criminal allegations would be unsuccessful in the end result, nonetheless was viewed by Petitioner as a frightening experience, and such action would serve to impugn her character, and would create the need to incur substantial expense if Petitioner was required to actively defend against any malicious and unfounded charges.

PURPOSE OF MANDATE

The subject matter of this Petition concerns the right to hearing over the action of the Ada County Sheriff, as was pursued with his termination of Petitioner from her employment as a Jail Technician, and also as to the County's failure to conduct such an administrative hearing; that Petitioner's discharge was constructed against her in a retaliatory manner by Sheriff Killeen and other Ada County agents because of no reason other than these erroneous wage overpayments made by the Ada County Payroll Department to Petitioner's joint checking account, caused by an administrative payroll error, being a consequence and resulting effect of the failure of the Ada County Payroll Department to perform mandatory record-keeping provisions for accurate and correct wage and pay records pursuant to the Federal *Fair*

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Labor Standards Act (FLSA), Title 29 U.S.C. § 201 *et seq*. To date, Ms. Gibson has been denied her right to a hearing before the County Board, a hearing she is entitled to in accordance with her due process rights and tenured employment created by the County Code, as authorized by Ada County Code, § 1-14-1 through § 1-14-8, and as perceived by the Supreme Court of Idaho in its Opinion No. 62, issued May 28, 2003.

PROCEDURAL HISTORY OF THE TERMINATION

That on August 2, 1999, pursuant to the Ada County Personnel System, Ada County Code, § 1-7G-3B, Sheriff Killeen sent notice to Petitioner of his intent to impose discipline upon her for cause, claiming Petitioner violated the provisions of Ada County Code, County Personnel System, § 1-7G-3A (5) and § 1-7G-3A (20), and § 9.04 of the Ada County Sheriff's Office Policy Manual. That on December 27, 1999, Sheriff Killeen sent notice to Petitioner that he did terminate Petitioner's employment.

Ms. Gibson appealed that decision under the County Personnel Policy, and a hearing was held before the Ada County Personnel Hearing Officer, G. Lance Salladay, on January 25th and 26th, 2000. Mr. Salladay was a staff member and paid as an employee of Ada County. (See Ada County Code, § 1-7G-3B through §1-7G-3N attached for reference).

On February 15, 2000, this County Hearing Officer affirmed the act of termination of Ms. Gibson's employment, and sustained the conduct of Sheriff Killeen.

On April 14, 2000, Ms. Gibson filed an Appeal of the Decision of the Ada County Personnel Hearing Officer with the Fourth District Court, pursuant to the appeal provisions and

instructions contained in the Ada County Code, § 1-7G-3(O). (See attached).

On May 7, 2001, Fourth District Judge Kathryn A. Sticklen, entered her Memorandum Decision and Order, affirming the decision of the Hearing Officer, subject to further judicial review by the Idaho Supreme Court, under the provisions of the County Ordinance. Of interest, the concept of County error had been addressed in the case of Jones v. Ada County, Fourth District Court, Ada County, Case No. CV OC 9800935D (1999). In that case, District Judge Deborah A. Bail ruled on August 4, 1999, that it was "shear caprice" to accuse an individual of misconduct when Ada County personnel had created an administrative (clerical) error.

From the decision rendered by Judge Sticklen, Ms. Gibson appealed to the Supreme Court of the State of Idaho, on June 18, 2001, and on May 28, 2003, the Idaho Supreme Court issued the Decision and Opinion No. 62 in Gibson v. Ada County Sheriff's Department, Case No. 27605, and therein vacated the judgment of the District Court, and dismissed the matter without prejudice, and stated in that Opinion, "it is the infirm appeal provision of A.C.C. § 1-7G-3(o), incorrectly instructing Gibson to appeal the decision of the county personnel hearing officer to the district court, which has prevented this Court from addressing the merits of this matter", and that "any attempt by the county to authorize judicial review of a personnel hearing officer's decision is infirm because it conflicts with the general laws of this State". The Supreme Court further stated, "Notably, had Gibson appealed the county personnel hearing officer's decision to the Ada County Board of Commissioners (board), the board's decision would be an appropriate subject for judicial review and the IAPA standard of review would apply. I.C. § 31-1506(1).

Without action of the board, however, the judicial review provisions of I.C. § 31-1506(1) are inapplicable".

For the reasons and direction given by the Supreme Court in its May 28, 2003 Decision, Ms. Gibson did request the Ada County Board of County Commissioners for a Board Hearing in accordance with the Ada County Code and Supreme Court Decision.

Her Petition for Review of this wrongful termination was submitted to the Ada County Board of Commissioners on June 4, 2003, and did notify the County of the "infirm" procedure before being utilized under the County Personnel System, Ada County Code, § 1-7G-3(O), and disclosed the fact the Idaho Supreme Court had declared that procedure to be infirm, and in contravention of statutory law, and announcing need to pursue agency review.

That Petition for Review was submitted as authorized by the Code in accordance with the Personnel Procedure identified in Ada County Code, § 1-14-1 through § 1-14-8, and undertaken as suggested by the Idaho Supreme Court in its Opinion No. 62.

On July 2, 2003, the Ada County Board of Commissioners submitted their response, and declined to take any action on the Petition, suggesting they had no authority over Sheriff terminations.

On July 16, 2003, Petitioner did request the Ada County Board of Commissioners to reconsider their position. That no action has been taken on said Motion for Reconsideration as of the date of submitting this brief and the Petition.

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Petitioner, having received no further response from Respondents, did file a Petition for Judicial Review (Case No. CV OC 0305850D) with the Fourth District Court, County of Ada, on July 30, 2003, and Judge D. Duff McKee was assigned and now presiding.

Pursuant to Idaho Code, § 67-5271, Petitioner had exhausted her available administrative remedies available to her in accordance with the Ada County Code and the *Idaho Administrative Procedures Act*, and no Record of any agency action exists, and none was created as no review hearing was granted.

On August 13, 2003, Petitioner requested the Fourth District Court to then remand her action to the Ada County Board of Commissioners, directing them to create a Record through a due process hearing, with a full and complete evidentiary hearing pursuant to Ada County Code, § 1-14-1 through § 1-14-8, requiring receipt of all evidence, testimony, and documents, and a complete response from the Board of Ada County, containing factual findings, conclusions of law, and a written decision based on the full and complete Record on all relevant issues raised in the Petitions for Review of the termination of employment.

Judge McKee issued an Order on August 20, 2003, designed to Govern Judicial Review, the effect of which serves to delay Petitioner's right to due process, as said "Governing Order" directs the preparation of a non-existent agency Record within forty-two (42) days. The nonexistent Record was a fact already known to the assigned Judge McKee, by virtue of the Motion for Remand.

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That Petitioner is an aggrieved party as a result of the denial of any speedy, plain and adequate remedy from this administrative agency's denial of a hearing, and Petitioner is entitled to intervention by the Idaho Supreme Court, in the form of an alternative Writ of Mandamus, directing the Ada County Board of Commissioners, pursuant to Title 7, Chapter 3, Statutes of the State of Idaho, to provide Petitioner a full and complete evidentiary hearing in the form of required due process, pursuant to Ada County Code, § 1-14-1 through § 1-14-8, requiring receipt of all evidence, testimony, and documents, and a complete response from the Board of Ada County, containing factual findings, conclusions of law, and a written decision based on the full and complete Record on all relevant issues involved in Petitioner's termination.

The Ada County Board of Commissioners have intentionally denied Petitioner a right to a due process hearing, for reasons we believe to delay the proceedings hopefully indefinitely in this matter, thus denying Petitioner an adequate remedy in the ordinary course of law, and the County Board has a clear, mandatory, ministerial and legal duty to provide Petitioner with a due process hearing. See Edwards v. Industrial Com'n of State, 130 Idaho 457, 943 P.2d 47 (1997), Idaho Falls Redev. Agency v. Countryman, 119 Idaho 43,794 P.2d 632 (1990), and Cowles Pub. Co. v. Magistrate Court, 118 Idaho 753, 800 P.2d 640 (1990).

The facts of this case demonstrate there has been an absence of a speedy remedy in the ordinary course of law and pursuant to Idaho Code, § 7-303, this Court should issue the alternative Writ of Mandamus, directing the reinstatement of Petitioner to her employment, or directing the County to create a Record, pursuant to the verified Petition submitted to the

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County for a Hearing and Review of the Sheriff's termination of Petitioner.

Dated this 5th day of September 2003

S/ Vernon K. Smith
Vernon K. Smith
Attorney for Petitioner

APPENDIX 28 – VERIFIED PETITION FOR WRIT(S) OF MANDAMUS

IN THE SUPREME COURT
OF THE STATE OF IDAHO

PETITION FOR WRIT(S) OF MANDAMUS

Filed: September 5, 2003

STACY A. GIBSON,

Petitioner,

v.

ADA COUNTY, a political subdivision and governmental agency of the State of Idaho and the ADA COUNTY SHERIFF'S OFFICE,

Respondents.

COMES NOW The Petitioner above-named, through counsel, Vernon K. Smith, and does request this Court, pursuant to Rule 5 and 43, I.A.R., to enter its Writ(s) of Mandamus, compelling Ada County, a political subdivision and governmental agency of the State of Idaho, acting through its Board of Ada County Commissioners, to provide relief to Petitioner as prayed for herein. Petitioner does allege a factual basis and state as follows:

I.

That Petitioner, at all times mentioned herein, is a citizen of the United States of America, a resident of the State of Idaho, and a resident of Ada County, Idaho.

II.

That Ada County is a political subdivision of the State of Idaho, and a statutorily authorized government agency; that the Ada County Board of Commissioners are the elected public officials of said governmental agency; that Ada County Sheriff's Office is a Department within this political subdivision and governmental agency of said Ada County.

III.

That the Idaho Supreme Court has jurisdiction over this subject matter, and is the proper venue of this action, pursuant to and in accordance with Article V, § 9 of the Idaho Constitution, Title 7, Chapter 3, Statutes of the State of Idaho, and § 1-203, Idaho Code.

IV.

That the subject matter of this Petition does concern the action of said Ada County's Sheriff's Office over the termination of Petitioner from her employment as a Jail Technician with Ada County, within the Department of the Ada County Sheriff's Office, and Ada County's failure to conduct a due process administrative hearing regarding the challenge raised over this wrongful termination; that Petitioner's discharge is believed to have been constructed against her in a retaliatory manner by Sheriff Vaughn Killeen, and other Ada County agents, because of erroneous wage overpayments made through the Ada County Payroll Department to Petitioner's joint checking account, the result of an administrative payroll error, being a consequence and resulting effect of the failure of Ada County and the Ada County Payroll Department to perform mandatory record-

keeping provisions for accurate and correct wage and pay records pursuant to the Federal *Fair Labor Standards Act* (FLSA), Title 29 U.S.C. § 201 *et seq*. That Petitioner did contend, and does continue to aver said termination was wrongful, arbitrary, capricious, contrary to law, a violation of the Ada County personnel merit system, and came about as a consequence of the County's various violations of the provisions of the *Fair Labor Standards Act*, statutory violations of Idaho Code, and now the failure of said agency to conduct a hearing at the Board level, now resulting in a denial of due process, and the fundamental part and essence of the subject matter concern and need for review.

V.

That the Ada County Payroll Department, within said governmental agency, has historically been violating the statutory duty to County employees by failing to perform mandatory compliance with the provisions of the *Fair Labor Standards Act*, 29 U.S.C. § 201 *et seq*. (FLSA), and as a result thereof, and in this dispute, payroll funds were deposited into the automatic payroll deposit to Petitioner's joint account, later identified by Ada County Payroll personnel to have been their administrative error, and of no fault of Petitioner. That the County's non-compliance and violations of the record-keeping provisions of FLSA caused the resulting effects of an abusive internal investigation and two (2) confrontational interrogations of Petitioner, and then lead to extortious threats to criminally prosecute Petitioner for grand theft, if she would not tender her immediate resignation of her protected and tenured employment, sought as being the Sheriff's method of resolution of this overpayment issue, and said Petitioner was told she could not retain her property right of tenured employment, and if she declined to resign, she would be

criminally charged and then also terminated by the Sheriff under his theory of cause. That Petitioner was denied her right to challenge her protected rights to employment or pursue any lawful rights for the ongoing FLSA violations. That Petitioner rejected the County's demands, and as a consequence of Petitioner's rejection of what was perceived to be an extortious offer and threat to her property rights, Petitioner did then suffer the exposure and consequence of the threats of criminal prosecution, but filing of such formal charges was declined by the independent analysis of Canyon County under conflict review; that Petitioner was nonetheless still subjected to termination of her employment as threatened by the Ada County Sheriff, as retaliation for her refusal to resign, constituting a capricious termination of her employment, and the malicious disregard of Petitioner's protected rights, and tenured employment that requires just cause for termination under the Ada County merit system.

PROCESS UTILIZED UNDER THE ADA COUNTY CODE

VI.

That on August 2, 1999, pursuant to the Ada County Personnel System, Ada County Code, § 1-7G-3B, Sheriff Killeen sent notice to Petitioner of his intent to impose discipline upon her for cause, claiming Petitioner violated the provisions of Ada County Code, County Personnel System, § 1-7G-3A (5) and § 1-7G-3A (20), and § 9.04 of the Ada County Sheriff's Office Policy Manual. That on December 27, 1999, Sheriff Killeen sent notice to Petitioner that he did terminate Petitioner's employment.

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VII.

That Ms. Gibson "appealed" the Sheriff's decision pursuant to the provisions and instructions contained in the Ada County Code, § 1-7G-3C, and as disclosed in Sheriff Killeen's letter of December 27, 1999; that a personnel hearing was held on January 25th and 26th, 2000 before the Ada County Personnel Hearing Officer, G. Lance Salladay, a staff member and services paid as an employee of Ada County. (See Ada County Code, § 1-7G-3B through §1-7G-3N).

VIII.

That on February 15, 2000, the Ada County Hearing Officer affirmed the termination of Petitioner's employment with the Ada County Sheriff's Office, and arbitrarily sustained the conduct of Sheriff Killeen.

IX.

That on April 14, 2000, Petitioner, filed a Notice of Appeal of the Decision of the Ada County Personnel Hearing Officer, with the Fourth District Court, Ada County, pursuant to the appeal provisions and instructions contained in said Ada County Code, § 1-7G-3O.

X.

That on May 7, 2001, Fourth District Judge, Kathryn A. Sticklen, entered her Memorandum Decision and Order, affirming the decision of the Ada County Personnel Hearing Officer, subject to further judicial review by the Idaho Supreme Court, under the provisions of the County Ordinance.

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XI.

That on June 18, 2001, Petitioner did file her Notice of Appeal with the Supreme Court of the State of Idaho, pursuant to the provisions of § 1-7G-3(O) of the Ada County Code and instructions for review, and on May 28, 2003, the Idaho Supreme Court issued a Decision as reflected in its Opinion No. 62 in Gibson v. Ada County Sheriff's Department, Case No. 27605.

XII.

That in that Decision and Opinion No. 62, the Supreme Court vacated the judgment of the District Court, and dismissed the matter without prejudice, and stated in that Opinion, "it is the infirm appeal provision of A.C.C. § 1-7G-3(o), incorrectly instructing Gibson to appeal the decision of the county personnel hearing officer to the district court, which has prevented this Court from addressing the merits of this matter", and that "any attempt by the county to authorize judicial review of a personnel hearing officer's decision is infirm because it conflicts with the general laws of this State" (Emphasis added), and further stated, "Notably, had Gibson appealed the county personnel hearing officer's decision to the Ada County Board of Commissioners (board), the board's decision would be an appropriate subject for judicial review and the IAPA standard of review would apply. I.C. § 31-1506(1). Without action of the board, however, the judicial review provisions of I.C. § 31-1506(1) are inapplicable".

XIII.

That for the reasons and direction given by the Supreme Court in its May 28, 2003 Decision, said Petitioner did petition

the Ada County Board of County Commissioners for a Board Hearing in this matter in accordance with those further provisions of Ada County Code, pursuant to the Supreme Court Decision.

XIV.

That Petitioner did submit her Petition for Review of her termination to the Ada County Board of Commissioners, on June 4, 2003, and did notify the County of the "infirm" procedure before being utilized under the County Personnel System, Ada County Code, § 1-7G-3(O), and did address the fact the Idaho Supreme Court did issue its Opinion No. 62, on May 28, 2003, thereby declaring the County appeal procedure to be "infirm", and in contravention of statutory law, and announcing need to pursue agency review before entering the judicial arena to obtain judicial relief; that a copy of said Petition to the Board for Agency Review is attached hereto, made a part hereof, and incorporated by reference as though set forth in full herein.

XV.

That said Petition for Board Review was submitted in accordance with the Ada County Personnel Procedure, identified in Ada County Code, § 1-14-1 through § 1-14-8, and undertaken as perceived by the Idaho Supreme Court in its Opinion No. 62.

XVI.

That on July 2, 2003, the Ada County Board of Commissioners submitted a letter response, therein stating they declined to take any action on the Petition for Board Review

and denied any relief. A copy of the Commissioner's denial letter is attached hereto, made a part hereof, and incorporated by reference as though set forth in full herein.

XVII.

That on July 16, 2003, Petitioner did request the Ada County Board of Commissioners to reconsider their position, a copy of which is attached hereto, made a part hereof, and incorporated by reference as though set forth in full herein. That no action has been taken on said Motion for Reconsideration as of the date hereof.

XVIII.

That Petitioner, having received no further response in any form from Ada County, did file with the Fourth District Court, County of Ada, on July 30, 2003, a Petition for Judicial Review (Case No. CV OC 0305850D), whereupon Judge D. Duff McKee was assigned to the case. A copy of Petitioner's Petition for Judicial Review is attached hereto, made a part hereof, and incorporated by reference as though set forth in full herein.

XIX.

That pursuant to Idaho Code, § 67-5271, Petitioner did come to believe she has exhausted her available administrative remedies known to her and available in accordance with the Ada County Code and the *Idaho Administrative Procedures Act*; that Petitioner did pursue relief from the District Court, but to accomplish that, a Record of the agency action must be created for review, and in this situation, no such agency Record

exists, as the Board refused to take up any action but to deny the right to a hearing.

XX.

That on August 13, 2003, Petitioner requested the Fourth District Court to remand this action to the Ada County Board of Commissioners to create a Record through a due process hearing, with a full and complete evidentiary hearing pursuant to Ada County Code, § 1-14-1 through § 1-14-8, requiring receipt of all evidence, testimony, and documents, and a complete response from the Board of Ada County, containing factual findings, conclusions of law, and a written decision from the Board based on the full and complete Record on all relevant issues raised in the agency level Petition for Review of the termination of her employment. A copy of Petitioner's Motion for Remand and Memorandum in Support of her Motion for Remand are attached hereto, made a part hereof, and incorporated by reference as though set forth in full herein.

XXI.

That said Judge McKee issued an Order Governing Judicial Review, dated August 20, 2003, the effect of which does serve to cause delay in Petitioner's right to due process, as said "Governing Order" directs the preparation of an agency Record within forty-two (42) days, well knowing no such agency Record exists, and a fact already known to the assigned Judge, from the Motion contents and attached letter of the County Board. A copy of Judge McKee's Order is attached hereto, made a part hereof, and incorporated by reference as though set forth in full herein.

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XXII.

That Petitioner is an aggrieved party as a result of these ongoing events and delays, and Petitioner is denied any speedy, plain or adequate remedy from this termination, either by administrative agency or the District Court, and Petitioner does believe she is entitled to intervention by the Idaho Supreme Court, either in the form of employment reinstatement, or an alternative Writ of Mandamus, directing the Ada County Board of Commissioners, pursuant to Title 7, Chapter 3, Statutes of the State of Idaho, to forthwith provide Petitioner with a due process hearing, and afford Petitioner a full and complete evidentiary hearing pursuant to Ada County Code, § 1-14-1 through § 1-14-8, requiring receipt of all evidence, testimony, and documents, and to the preparation of a complete response from the Board of Ada County, containing factual findings, conclusions of law, and a written decision based on the full and complete Record of all relevant issues involved in Petitioner's request for a hearing and Review.

WHEREFORE, Petitioner does pray for relief as follows:

1. This Court take either the immediate action to reverse the December 27, 1999 termination of Petitioner by Ada County Sheriff, Vaughn Killeen, and the February 15, 2000 Decision of the Ada County Personnel Hearing Officer, G. Lance Salladay, and fully reinstate Petitioner to her employment position as a Jail Technician with the Ada County Sheriff's Office, and provide her all wages, benefits and entitlements that would have accrued to her, or in the alternative, issue a Writ of Mandamus as requested herein, and thereby compel the County Board to provide a due process hearing and afford Petitioner a full and complete evidentiary hearing pursuant to Ada County Code, § 1-14-1 through § 1-

14-8, requiring receipt of all evidence, testimony, and documents, and a complete response from the Board of Ada County, containing factual findings, conclusions of law, and a written decision based on the full and complete Record of all relevant issues involved in Petitioner's request for a hearing and Review.

2. That Petitioner recover all costs and attorney fees incurred in this proceeding pursuant to issuance of peremptory Writ(s) of Mandamus, as provided for by Idaho Code, § 7-312.

3. For such other and further relief as this Court may deem just and proper in the premises.

Dated this 5th day of September 2003.

s/ Vernon K. Smith
Vernon K. Smith
Attorney for Petitioner

STATE OF IDAHO)
: ss
County of Ada)

Stacy A. Gibson, being first duly sworn upon oath, deposes as follows:

That I have read the above and foregoing Petition for Writ(s) of Mandamus; that I know the contents thereof; and the facts therein stated I believe to be true.

s/ Stacy A. Gibson
Petitioner

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SWORN AND SUBSCRIBED to before me this 5th day of September 2003.

s/ Vernon K. Smith
Notary Public for Idaho
Residing at Boise, Idaho
My Commission Expires: 12/20/06

APPENDIX 29 – ORDER GOVERNING JUDICIAL REVIEW ENTERED BY JUDGE D. DUFF MCKEE, FOURTH DISTRICT COURT (DOCKET NO. 30976), FILED AUGUST 20, 2003

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Case No. CV OC 0305850D

ORDER GOVERNING JUDICIAL REVIEW

Filed: August 20, 2003

STACY A GIBSON,

Petitioner,

vs.

ADA COUNTY, a political subdivision and governmental agency of the State of Idaho AND THE ADA COUNTY SHERIFF'S OFFICE,

Respondents.

Petition for Judicial Review having been filed herein, and it appearing that the issues presented on appeal are questions of law and fact; and it further appearing that a transcript is necessary to process this appeal;

It is ORDERED:

1) That the Agency shall transmit to the Court the original or a certified copy of the entire record in this proceeding within

forty-two (42) days after the service of the petition for judicial review.

2) That the Agency, upon lodging with the Court the record, shall send notice of such filing to all parties;

3) That the parties have twenty-one (21) days from the date that notice is mailed within which to file objections to the record. If no objections are received, the record shall be deemed settled.

4) That the Petitioner's brief shall be filed and served within thirty-five (35) days of the date the record is lodged.

5) That the Respondent's brief shall be filed and served within twenty-eight (28) days after service of Petitioner's brief.

6) That Petitioner's reply brief, if any, shall be filed and served within twenty-one (21) days after service of Respondent's brief.

7) That either party may notice the matter for oral argument after all briefs are filed, and that if within fourteen (14) days after the final brief is filed, neither party does so notice for oral argument, the Court will deem oral argument waived and decide the case on the briefs and the record.

Dated this 19th day of August 2003

s/ D. Duff McKee
D. DUFF MCKEE
Senior District Judge

APPENDIX 30 – ORDER WITHDRAWING ORDER DENYING MOTION FOR RECONSIDERATION AND ORDER ENTERED BY JUDGE RONALD J. WILPER, FOURTH DISTRICT COURT (DOCKET NO. 31553), FILED JUNE 11, 2003

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Case No. CVOC01-07394D

ORDER WITHDRAWING ORDER DENYING MOTION FOR RECONSIDERATION AND ORDER

Filed: June 11, 2003

ADA COUNTY,

Plaintiff/Counterdefendant,

vs.

STACY A. GIBSON,

Defendant/Counterclaimant.

This matter came before the court on the defendant/counterclaimant's motion for permission to appeal the court's interlocutory order denying a motion to amend the counterclaim.

Upon further consideration and good cause appearing therefore, it is hereby ordered and this does order that the counterclaimant may file an amended counterclaim pursuant to

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Rule 15, I.R.C.P. as a matter of right because no responsive pleading to the original counterclaim has been filed.

IT IS SO ORDERED.

6-11-03

s/ Ronald J. Wilper
Ronald J. Wilper
District Judge

APPENDIX 31 – MEMORANDUM IN SUPPORT OF [GIBSON] MOTION FOR PERMISSION TO APPEAL FROM DISTRICT COURT'S INTERLOCUTORY ORDER ENTERED FEBRUARY 19, 2003 BY JUDGE RONALD J. WILPER, FOURTH DISTRICT COURT (DOCKET NO. 31553), LODGED MAY 16, 2003

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Case No. CV OC 0107394D

MEMORANDUM IN SUPPORT OF MOTION FOR PERMISSION TO APPEAL FROM DISTRICT COURT'S INTERLOCUTORY ORDER ENTERED FEBRUARY 19, 2003

Filed: May 16, 2003

ADA COUNTY,

Plaintiff/Counterdefendant,

vs.

STACY A. GIBSON,

Defendant/Counterclaimant.

INTRODUCTION

The Defendant/Counterclaimant above-named, through counsel, Vernon K. Smith, pursuant to Rule 12, I.A.R., and Rule 7 (b)(3), I.R.C.P., has requested this Court to enter an

order, thereby granting Defendant judicial permission to appeal the District Court's interlocutory order entered February 19, 2003 to the Idaho Supreme Court for Appellate Review in order to bring into focus the controlling question of the application of the *Fair Labor Standards Act* (FLSA) as a legitimate claim to be raised by Defendant as a defense, and as a lawful counterclaim, regarding the rights of Defendant and the violation of her employment rights, resulting from the inadequate wage and record-keeping procedure utilized by Ada County and the County Payroll Department, the effects of which caused the administrative error and overpayment of Defendant's monthly wages into a joint checking account under the direct deposit system as then being used by the County, resulting in Defendant's mistaken receipt of funds, due to the County's negligence and violation of the FLSA provision announced in 29 U.S.C. § 211 (c). Defendant-Counterclaimant does contend the subject matter in dispute does involve a controlling question of law, as to the application of FLSA as a defense and as a cause of action, and the current District Court Order does preclude this moving party from asserting that defense and claim, and said Defendant does believe the effects thereof are contrary to existing Federal law, as it does prevent her from defending and advancing her cause of action as provided for in her Amended Counterclaim and subsequent pleadings to be processed in the Court.

STATEMENT OF FACTS

Defendant filed her Answer, Affirmative Defenses and Counterclaim in this case on May 7, 2002, therein providing detailed facts surrounding Defendant's employment and the protection and rights afforded to her under the terms, conditions and provisions of the Ada County Code, County Personnel System, § 1-7-1 through § 1-7L-10 and specifically

the Federal protection laws concerning employment, entitled the *Fair Labor Standards Act*, 29 U.S.C. § 201 *et seq.*, as applied to Defendant's employment under the statutory scheme of Federal law and by the specific language contained in the Ada County Code, § 1-7C-1.

On July 11, 2002, Defendant requested this Court to allow her to amend her counterclaim to more specifically describe the detail of her allegations, and specifically the manner in which Ada County and the Ada County Sheriff's Office had violated her rights and the provisions of the *Fair Labor Standards Act*, 29 U.S.C. § 211 (c), and the consequence of those violations that resulted in the mistaken receipt of funds. The effect of the overpayments was then being used as an unlawful basis by the County to wrongfully terminate Defendant, despite the fact the errors were caused by and resulted from the erroneous wage and record-keeping process used by the Ada County Sheriff's Office and Ada County Payroll Department. The administrative error was due to the flawed accounting process used back in 1998 and 1999, and in effect by the County until the events of that ongoing non-compliance was made a major issue of concern, and administrative efforts were taken to come into some level of compliance with Federal mandates, approximately January 10, 2002.

On February 19, 2003, the Court signed an Order (prepared by the counsel for Ada County) denying Defendant's Motion to Dismiss the County's case, and further ordered "Defendant's Motion to Amend Counterclaim, which sought to include an additional cause of action under the Fair Labor Standards Act, 29 U.S.C. § 211 (c), is denied." The effect of the Order was to deny Defendant her constitutional right to due process of law, and a judicial forum to seek redress for the County's abuse of

process and FLSA violations which, if left as it is currently ordered, may allow the County to escape judicial review and imposition of appropriate sanctions for their wage and record-keeping violations and wrongful termination resulting from their non-compliance of mandatory law, their violation of employee rights, privileges and protection under the law, and enforcement of Federal sanctions in this judicial forum. These rights and damages resulting cannot be waived, modified or precluded from the full protection of mandated compliance, which does impose sanctions as a matter of law, for any violations identified in an employee dispute over salary and wage matters, whether for under payments, overpayments, or employee benefits.

Defendant did further file her Motion and Memorandum, requesting this Court to reconsider the February 19, 2003 Order, and in that Memorandum, Defendant did provide authority for the Court's reference, thereby demonstrating the manner and nature by which the numerous Federal courts have ruled on the issue employment rights under the *Fair Labor Standard Act* cannot be thwarted, abridged or waived; that the *Act* cannot be construed in any narrowing manner; that the employer is responsible for "knowledge" and "management" of the *Act*; that the *Act* compels the employer (solely) to make, keep and preserve accurate employee wage records; that under no circumstance or condition, and at no time, or for any reason, may the employer transfer or attempt to transfer any responsibility under the *Act* to the employee; that any failure of the employer to comply with any provision of the *Act* will be at the employer's own peril, and it does make the employer subject to ramifications and sanctions.

Defendant further supplemented her Motion and Memorandum for reconsideration on April 8, 2003 with

additional documentary authority to support her Motion, which served to confirm Ada County was knowingly in violation of FLSA, and has been in a continuing state of non-compliance for a period of years, and the County Commissioners, in the last administration, after Defendant's termination, were attempting to come into compliance with the *Act* by January 10, 2002.

On April 18, 2003 the Court entered an Order Denying Defendant's Motion to Reconsider. The Court's ruling in this case is absent Findings of Fact and Conclusions of Law, as may otherwise be required in accordance with Rule 52 (a) I.R.C.P., as some factual finding had to be made in order to find this Defendant will not be allowed due process and enforcement of the provisions under FLSA. The entry of Findings and Conclusions would have been beneficial to the parties to clarify any thought on the issues as may be presented for appellate review.

CASE AUTHORITY

The Idaho Supreme Court stated in Kindred v. Amalgamated Sugar Co., 118 Idaho 147, 794 P.2d 309 (1990):

> "Under I.A.R. 12, a party may seek permission to appeal from an interlocutory order which is not otherwise appealable as a matter of right under I.A.R. 11 (d). Generally, an appeal under I.A.R. 12 will be permitted when the order involves a controlling question of law as to which there is substantial grounds for difference of opinion and that an immediate appeal may materially advance the orderly resolution of the

litigation. *Budell v. Todd*, 105 Idaho 2, 665 P.2d 701 (1983)."

The United States Congress adopted the *Fair Labor Standards Act*, 29 U.S.C. § 201 *et seq*. in 1938, as remedial legislation to address employment disputes over wages, pay, salaries and discriminatory, retaliatory and capricious terminations resulting from wage and record-keeping disputes over hours worked and payment of wage to employees. It is a question of law under the facts of this case, the courts have previously and consistently determined any attempt to impose restrictive interpretation of the *Act* is contrary to that congressional intent. See Lamon v. City of Shawnee, Kan., 754 F.Supp. 1518 (D.Kan 1991). All employment subject to the *Fair Labor Standards Act* must be construed to include all rights and all terms of the Act. See Manseau v United States, 52 F Supp 395(DC Mich., 1943); Walling v McKay, 70 F Supp 160 (DC Neb., 1946), affd (CA8 Neb) 164 F2d 40; Orminski v Hyland Electrical Supply Co., 326 Ill App 392, 62 NE2d 14 (1945). No party can attempt to limit the scope of the *Fair Labor Standards Act*. See Kappler v Republic Pictures Corp., 59 F Supp 112 (DC Iowa, 1945), affd (CA8 Iowa) 151 F2d 543, 162 ALR 228, affd 327 US 757, 90 L Ed 991, 66 S Ct 523, reh den 327 US 817, 90 L Ed 1040, 66 S Ct 804. The Federal courts have remained firm on the content of the entire enactment to protect the employee against abuse of process that could affect any of the rights and duration of employment.

An employee is protected even when he communicates to the employer of the failure to perform their mandatory duty (e.g. accurate record-keeping) under the *Act*. Because the employee is protected at all times, under § 215 (a)(3) of the *Act*, the employer will be considered in violation of the *Act* if any adverse action is taken against the employee, such as

termination over wage overpayments caused from inadequate record-keeping procedures, as that would result in the potential of discriminatory misconduct. In short, an employee who "complains" to their employer about the employer's violations of FLSA, such as administrative errors due to improper, incorrect or inaccurate wage and salary record-keeping, is protected from discriminatory treatment, retaliatory treatment, punishment or termination under § 215 (a)(3) of the *Fair Labor Standards Act*. That is the situation we have here, as Ms. Gibson had complained about the errors each pay period, during her early tenure with Ada County, and ultimately decided to live with their errors, only to thereafter become subject to discipline from their administrative errors, as they fired her over a subsequent series of events where the County caused excessive wage deposits to her account, and said it was then somehow her fault for not being aware of it or reacting to it, apparently despite the fact Ada County controls all aspects of payroll, records, deposits and debits to any direct deposit account with any employee, and they generated the pay voucher and put their own figures on it, including her described base salary of $1,550.00 (should have been (1,575.00).

In Hageman v. Park West Gardens, 480 N.W.2d 223 (N.D. 1992, citing the Federal District Court decision in Brennan v. Maxey's Yamaha, Inc., 513 F.2d 179, 180 (8th Cir. 1975), the North Dakota Supreme Court made the following relevant discussion:

> "The Fair Labor Standards Act "prohibits discrimination against an employee who asserts or threatens to assert his or her FLSA rights."

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> "Where the immediate cause or motivating factor of a discharge is the employee's assertion of statutory rights, the discharge is discriminatory under [29 U.S.C.] § 215 (a)(3) whether or not other grounds for discharge exist. Goldberg v. Bama Manufacturing Corp., 302 F.2d 152 (5th Cir. 1962); Mitchell v. Goodyear Tire & Rubber Co., 278 F.2d 562 (8th Cir. 1960)."

The North Dakota Supreme Court stated "Thus, where an employee is fired and the termination is motivated in any part by the employee's assertion of rights under the Act, such termination is deemed discriminatory." See also Martin v. Gingerbread House, Inc., 977 F.2d 1405, 1408 N. 4 (10th Cir. 1992) and Love v. RE/MAX of America, Inc., 738 F.2d 383, 387 (10th Cir. 1984).

The *Fair Labor Standards Act* is deliberate and specific, and requires the employer to keep accurate records showing whether the employer (Ada County) is being compliant with FLSA, and this record-keeping activity is an appropriate means to a legitimate end, especially since these records are considered to be *quasi*-public in character. In one of the earliest case assessments involving FLSA record-keeping, Walling v. De Soto Creamery & Produce Co., 51 F. Supp. 938 (DC Minn. 1943), the court made the following conclusion of law:

> "By failing to keep true records of the hours worked each work day and each workweek by each of its employees, and by making or causing to be made arbitrary, fictitious and false entries, purporting to reflect the hours worked

> each day and each workweek by each of its employees, the regular rate of pay, the regular straight time earnings, and the additional overtime earnings of many of its employees as above stated, the defendant has violated the provisions of Sections 11 (c) and 15 (a)(5) of the Act."

When Stacy Gibson denied the contentions and allegations of any misconduct, as was alleged by agents of the Ada County Sheriff, Vaughn Killeen, on July 20, 1999 (during two (2) interrogations), and thereafter on two (2) more separate occasions, being August 6, 1999 and again on September 27, 1999, Ms. Gibson had again expressed her concerns, and in doing so, asserted her rights over these administrative errors, and the resulting actions taken from her complaints about the record-keeping errors was forthcoming in the form of wrongful threats to her employment, and we must conclude, in accordance with the 9th Circuit Court's decision in Lambert v. Ackerley, *supra* and E.E.O.C. v. Romeo Community Schools, *supra*, that Ms. Gibson has formally and repeatedly asserted her employment rights under all provisions of the *Fair Labor Standards Act*, including the fact Ada County personnel had created and perpetuated the administrative error (incorrect and/or inaccurate FLSA record-keeping), which was the only basis for the threat of prosecution and threat of discipline, and basis for retaliatory conduct and Stacy's resulting termination. Ms. Gibson had no participation or involvement in any of the County's mandatory FLSA record-keeping process, she knew nothing of the error, and she was not a participant in the disbursement of any overpayment of wages that resulted in her mistaken receipt of money in the joint checking account with her husband. The County also had the exclusive right to debit

the account at any time, as agreed by the terms of the voluntary direct deposit pay program.

There was no basis for any "criminal investigation" as Ms. Gibson had no say in Ada County violating their mandatory record-keeping duty and obligation under the terms and provisions of FLSA (late October 1998 through July 1999). The County ascertained their administrative error on July 19, 1999, and thereafter proceeded to interrogate Ms. Gibson, at which time, and several times thereafter (while still an Ada County employee), she expressed her attitude over their errors, and abuse of her rights, and voiced her concerns, and did assert her employment rights and the statutory protection provided to her by the terms and conditions of FLSA. Any action taken by the County, beginning July 20, 1999, and all times thereafter, must be viewed as retaliatory FLSA violations, as addressed by Lambert v. Ackerley, 180 F.3d 997 at 1007-1008 (9th Cir. 1998), E.E.O.C. v. Romeo Community Schools, 976 F.2d 985 at 989 (6th Cir. 1992), Hageman v. Park West Gardens, Brennan v. Maxey's Yamaha, Inc., *supra*, and Walling v. De Soto Creamery & Produce Co., *supra*.

CONCLUSION

Defendant does believe the current state of the issues presented as a result of these orders are of a significant and substantial legal concern, of great public interest, and involve a controlling question of law on the issues of employee rights, privileges, protections and what is expected of an FLSA affected employer who remains knowingly out-of-compliance of the mandatory law, in violation of the Federal enactment and of its own County Code requirements, and then disregards its own administrative errors caused from the record-keeping violations, and disregards the pay reduction provision

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mandated in its own County Personnel System, and then discriminates against a loyal – never once disciplined – employee, by the retaliatory, arbitrary and capricious termination of such a dedicated employee, because of the voiced attitude over their pay voucher errors. We are confronted with an employer who believes it is above the law and can conduct this course of conduct with impunity. Defendant respectfully requests the Court to enter an Order approving her Motion to Appeal by Permission and seek determination from the Appellate Court concerning Defendant's rights to due process of law by the use of the FLSA legislation as a defense and a cause of action.

Dated This 16th day of May 2003.

s/ Vernon K. Smith
Vernon K. Smith
Attorney for Defendant/Counterclaimant

APPENDIX 32 – [GIBSON] MOTION PERMISSION TO APPEAL FROM DISTRICT COURT'S INTERLOCUTORY ORDER ENTERED FEBRUARY 19, 2003 BY JUDGE RONALD J. WILPER, FOURTH DISTRICT COURT (DOCKET NO. 31553), FILED MAY 2, 2003

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Case No. CV OC 0107394D

MOTION FOR PERMISSION TO APPEAL FROM DISTRICT COURT'S INTERLOCUTORY ORDER ENTERED FEBRUARY 19, 2003

Filed: May 2, 2003

ADA COUNTY,

Plaintiff/Counterdefendant,

vs.

STACY A. GIBSON,

Defendant/Counterclaimant.

COMES NOW The Defendant/Counterclaimant above-named, through counsel, Vernon K. Smith, and pursuant to Rule 12, I.A.R., and Rule 7 (b)(3), I.R.C.P., does request this Court to enter an order to grant Defendant permission to appeal the District Court's interlocutory order entered February 19, 2003 to the Idaho Supreme Court, upon the controlling question of the application of the *Fair Labor Standards Act*

(FLSA) as a claim to be raised by Defendant as a defense and as a counterclaim regarding the rights of Defendant and the violation of those rights, resulting in the inadequate wage and record-keeping procedure that caused the administrative error and overpayment of Defendant's salary into a joint checking account under the direct deposit system used by the County, resulting in Defendant's mistaken receipt of funds from the County's negligence and violation of the FLSA provision announced in 29 U.S.C. § 211 (c). Defendant does contend the subject matter does involve a controlling question of law, and the current District Court Order does preclude Defendant, contrary to existing Federal case law, from properly defending and advancing her cause of action as provided for in her Amended Counterclaim and subsequent pleadings to be processed in the Court.

Defendant filed her Answer, Affirmative Defenses and Counterclaim in this case on May 7, 2002, therein providing detailed facts surrounding Defendant's employment and the protection and rights afforded to her under the terms, conditions and provisions of the Ada County Code, County Personnel System, § 1-7-1 through § 1-7L-10 and specifically the Federal protection laws concerning employment, entitled the *Fair Labor Standards Act*, 29 U.S.C. § 201 *et seq.*, and applied to Defendant's employment under the provisions of Federal law and by the specific language in the Ada County Code, § 1-7C-1. On July 11, 2002, Defendant requested this Court to allow her to amend her counterclaim to more specifically describe the detail in support of her allegations as the manner in which Ada County and the Ada County Sheriff's Office had violated her rights and the provisions of the *Fair Labor Standards Act*, 29 U.S.C. § 211 (c), and the consequence of those violations resulted in the mistaken receipt of funds, and was then made the unlawful basis and foundation used by

the County to wrongfully terminate Defendant, all of which was caused by and resulted from the erroneous wage and record-keeping process of the Ada County Sheriff's Office and Ada County Payroll Department, due to the flawed accounting process used back then and in effect by the County, before the events of non-compliance were made a major concern and administrative efforts taken to come into compliance with the Federal mandates.

That the United States Congress adopted the *Fair Labor Standards Act*, 29 U.S.C. § 201 *et seq.* in 1938 as remedial legislation to prevent employment disputes over wages, pay, salaries and discriminatory and capricious terminations resulting from wage and record disputes over hours worked and payment of wage to employees. Accordingly, the courts have previously and consistently determined any attempt to impose restrictive interpretation of the *Act* is contrary to that congressional intent. For example, see Lamon v. City of Shawnee, Kan., 754 F.Supp. 1518 (D.Kan 1991). Furthermore, **all employment** subject to the *Fair Labor Standards Act*, must be construed to include all rights and **all terms** of the Act. See Manseau v United States, 52 F Supp 395(DC Mich., 1943); Walling v McKay, 70 F Supp 160 (DC Neb., 1946), affd (CA8 Neb) 164 F2d 40; Orminski v Hyland Electrical Supply Co., 326 Ill App 392, 62 NE2d 14 (1945). No parties can attempt to limit the scope of the *Fair Labor Standards Act*. See Kappler v Republic Pictures Corp., 59 F Supp 112 (DC Iowa, 1945), affd (CA8 Iowa) 151 F2d 543, 162 ALR 228, affd 327 US 757, 90 L Ed 991, 66 S Ct 523, reh den 327 US 817, 90 L Ed 1040, 66 S Ct 804. The Federal courts have remained firm on these issues of application and reliance on the content of the entire enactment to protect the employee against any abuse of process that could affect the rights and duration of employment.

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On February 19, 2003, the Court signed an Order (prepared by the counsel for Ada County) denying Defendant's Motion to Dismiss the County's case, and the Court further ordered "that Defendant's Motion to Amend Counterclaim, which sought to include an additional cause of action under the Fair Labor Standards Act, 29 U.S.C. § 211 (c), is denied", the effect of which is to deny Defendant due process of law, and allow the County's abuse of process and FLSA violations to escape judicial review and imposition of appropriate sanctions for their wage and record-keeping violations and wrongful terminations resulting from their own non-compliance of mandatory law, and violations of employee rights, privileges and protection that cannot be waived, modified or precluded from the full protection of mandated compliance, which does impose sanctions as a matter of law, for any violations identified in the employee dispute over salary and wage matters, whether for under payments, overpayments, or employee benefits.

Defendant did timely file her Motion and Memorandum, requesting this Court to reconsider the Court's February 19, 2003 Order, and in her Memorandum, Defendant did provide case authorities for the Court's reference, thereby demonstrating the manner and nature by which the numerous Federal courts have ruled (1) employment rights under the *Fair Labor Standard Act* cannot be thwarted, abridged or waived; (2) the *Act* cannot be construed in any narrowing manner; (3) the employer is responsible for "knowledge" and "management" of the *Act*; (4) the *Act* compels the employer (solely) to make, keep and preserve accurate employee wage records; (5) under no circumstances or conditions, at no time, for any reason, may the employer transfer or attempt to transfer any responsibility under the *Act* to the employee; and (6) any failure of the employer to comply with any provisions of the

Act will be at the employer's own peril, and places the employer in instant violation of the *Act*, subject to ramifications and sanctions. Defendant further supplemented her Motion and Memorandum for reconsideration on April 8, 2003 with additional documentary authority in support of her Motion, all of which confirmed Ada County is knowingly in violation of FLSA, and has been in a continuing state of non-compliance for years, and the County Commissioners, in this new administration, after Defendant's termination, was attempting to come into compliance no later than January 10, 2002. On April 18, 2003 the Court entered an Order Denying Defendant's Motion to Reconsider. The Court's ruling in this case was thereupon absent of any entry of Findings of Fact and Conclusions of Law, as required by and in accordance with Rule 52 (a) I.R.C.P., as some factual finding had to be made to provide Defendant the due process she is entitled under FLSA. The entry of such Findings and Conclusion are helpful especially for purposes to clarify the issues presented for appellate review.

Defendant does believe state of the issues presented as a result of these orders are of a significant and substantial legal concern, of great public interest, and involve a controlling question of law on the issues of employee rights, privileges, protections and what is expected of an FLSA affected employer who remains knowingly out-of-compliance of the mandatory law, in violation of the Federal enactment and of its own County Code requirements, and then disregards its own administrative errors caused from the record-keeping violations, and disregards the pay reduction provision mandated in it own County Personnel System, and then discriminates against a loyal – never once disciplined – employee, by an arbitrary and capricious termination of a dedicated employee, believing it is above the law and can

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conduct this course of conduct with impunity. Defendant respectfully requests the Court to enter an Order approving this Motion to Appeal by Permission and seek determination from the Appellate Court concerning Defendant's rights to due process of law.

Defendant will submit her supporting brief, issues and memorandum within fourteen (14) days of the filing date of this Motion, as provided for by Rule 7 (b)(3) I.R.C.P., therein setting forth the requested relief for the concerns raised.

Dated This 2nd day of May 2003.

s/ Vernon K. Smith
Vernon K. Smith
Attorney for Defendant/Counterclaimant

APPENDIX 33 – ORDER OVERRULING OBJECTION TO PROPOSED JUDGMENT ENTERED BY JUDGE RONALD J. WILPER, FOURTH DISTRICT COURT (DOCKET NO. 29694), FILED MARCH 5, 2003

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Case No. CVOC02-05601D

ORDER OVERRULING OBJECTION TO PROPOSED JUDGMENT

Filed: March 5, 2003

STACY A. GIBSON,

Plaintiff,

vs.

ADA COUNTY, et al,

Defendant.

The Objection to the Proposed Order and Judgment is overruled.

IT IS SO ORDERED.

3-5-03
Date

s/ Ronald J. Wilper
Ronald J. Wilper
District Judge

APPENDIX 34 – [GIBSON] OBJECTION TO PROPOSED ORDER AND JUDGMENT, FILED FEBRUARY 19, 2003

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Case No. CV OC 0205601D

OBJECTION TO PROPOSED ORDER AND JUDGMENT

Filed: February 19, 2003

STACY A. GIBSON,

Plaintiff,

vs.

ADA COUNTY, a political subdivision of Idaho; ADA COUNTY SHERIFF'S OFFICE; VAUGHN KILLEEN, acting individually and in his official capacity under color of State Law as Ada County Sheriff; R. MONTE MACCONNELL, acting individually and in his official capacity under color of State Law as Legal Advisor to the Ada County Sheriff; ARVILLE GLENN, acting individually and in his official capacity under color of State Law as a law enforcement official for Ada County under the Sheriff; SCOTT JOHNSON, acting individually and in his official capacity under color of State Law as a law enforcement official for Ada County under the Sheriff; and DOES I thru X,

Defendants.

COMES NOW The Plaintiff above named, through counsel, and does herewith object to the proposed "Order and

Judgment" submitted by Ada County under the cover letter of January 27, 2003, for the reasons and upon the grounds as follows:

1. Though Plaintiff disagrees wholly with the Court's decision, the content of any Order entered by this Court cannot exceed the subject matter relied upon and before it. This Court did not address the merits of Plaintiff's Title 42 Civil Rights claim; it only decided the application of the Court's perception of the statute of limitations and accrual of the action. This case was filed as a Title 42 Civil Rights action; this Court concluded (accepting the County's argument) Plaintiff had exhausted her administrative remedies by not later than February 15, 2000, and this Court concluded her cause of action accrued on that date (according to the County's argument) and therefore the two (2) year statute of limitations, § 5-218, Idaho Code, would have run on her pending claim as alleged in this case, based upon the time frame in filing this action. This "conclusion" as set forth above is based upon the "reasoning" we must assume the Court accepted as submitted by Ada County, thought it has not anywhere been declared by the Court as any Finding of Fact or Conclusion of Law, as is required, unless otherwise waived, by the parties. Assuming the Court intended to make such a Finding and Conclusion utilizing the reasoning of the County, it is limited to the time filing in this case only, and an order dismissing Plaintiff's Complaint must be **without** prejudice, as Plaintiff does have the right to file her Title 42 Civil Rights action within the framework of an Amended Counterclaim in that action currently pending before this Court, entitled Ada County v. Gibson, Case No. CV OC 0107394D, in which case, Ada County filed suit against Defendant, Stacy A. Gibson, seeking reimbursement of funds mistakenly paid to her through a direct deposit by the Ada County Payroll Department, based upon an

administrative error in her salary, the result of improper record keeping, a violation of the Federal *Fair Labor Standards Act* and events giving rise to a Title 42 Civil Rights action. In that action, Ms. Gibson filed her Answer and her First Counterclaim, reserving the right to file further pleadings as deemed appropriate. Within the framework of the factual background and subject matter alleged by Ada County, Ms. Gibson does have both a permissive as well as a compulsory counterclaim to file, pursuant to Rule 13 (a) and Rule 13 (b), I.R.C.P, and Ms. Gibson does have the right to amend her pleadings pursuant to Rule 15 I.R.C.P. which must be liberally construed to allow all of the issues to be raised fully before the Court for a proper disposition upon the merits. That pursuant to such an amendment, it does relate back in time to the filing of Ada County's suit, well within the two (2) year period of limitations, under this Court's perception the administrative rights were exhausted on February 15, 2000, and not still engaged in the exhaustion process under the *Idaho Administrative Procedures Act*. It is Ms. Gibson's position that her Amended Counterclaim in the above referenced pending action will be filed forthwith, and will relate back to the timing in which the County filed their suit, November 7, 2001, thereby constituting a "timely" filing of a Title 42 Civil Rights action, pursuant to the "reasoning" utilized by this Court in determining Ms. Gibson's cause of action accrued on February 15, 2000, when her administrative remedies were fully pursued and "exhausted" on that date.

Therefore, this Court cannot enter an order dismissing the above action "with prejudice" as that would inappropriately limit Ms. Gibson's right to pursue her cause of action in the other suit currently pending before the Court, as provided by the Rules of Civil Procedure.

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Furthermore, Plaintiff does intend to pursue an appellate review of the reasoning announced in this Court's decision, including any Finding of Facts and Conclusions of Law, and it is important to have a clear, complete and accurate record from this Court for review, including this Court's entry of appropriate Findings of Fact, Conclusions of Law and a dismissal Order, limited to the specific issue of the statute of limitations, accrual of action, and the exhaustion of administrative remedies.

Dated this 16th day of February 2003.

s/ Vernon K. Smith
Vernon K. Smith
Attorney for Plaintiff

APPENDIX 35 – ORDER AND JUDGMENT ENTERED BY JUDGE RONALD J. WILPER, FOURTH DISTRICT COURT (DOCKET NO. 29694), FILED FEBRUARY 19, 2003

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Case No. CV OC 0205601D

ORDER AND JUDGMENT

Filed: February 19, 2003

STACY A. GIBSON,

Plaintiff,

vs.

ADA COUNTY, et al,

Defendant.

This matter having come before the Court for hearing on Defendant's Motion to Dismiss and the parties having appeared by their counsel of record, and the Court having considered arguments of the parties, and the Court being fully advised in the matter, and having found:

1. That a two-year statute of limitations applies to all Title 42 U.S.C., civil rights claims, and that the statute of limitations on this action expired on February 15, 2002, therefore the claims are time-barred;

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2. That to the extend Plaintiff seeks relief under a tort theory, Plaintiff did not file a notice of tort claim, which is a condition precedent to bringing a tort action against Defendants; and

3. That as to her Title 42, section 1981 claim, Plaintiff failed to allege facts to support a claim for racial discrimination;
and for other good cause appearing therefore:

NOW, THEREFORE, IT IS HEREBY ORDERED, that Defendant's Motion to Dismiss is granted and Plaintiff's action against all Defendants is dismissed in its entirety with prejudice, and that pursuant to Rule 56, I.R.C.P., summary judgment is hereby granted in favor of Defendants.

DATED this 15 day of Feb. 2003.

s/ Ronald J. Wilper
Ronald J. Wilper
District Judge

APPENDIX 36 – ORDER ENTERED FEBRUARY 19, 2003 BY JUDGE RONALD J. WILPER, FOURTH DISTRICT COURT (DOCKET NO. 31553), FILED FEBRUARY 19, 2003

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Case No. CV OC 0107394D

ORDER

Filed: February 19, 2003

ADA COUNTY,

Plaintiff,

vs.

STACY A. GIBSON,

Defendant.

This matter having come before the Court on Defendant's Motion to Dismiss, and the parties having appeared by their counsel of record, and the Court having considered arguments of the parties, and the Court being fully advised in the matter, and the Court having found that none of the bases under which Defendant brought her Motion to Dismiss are applicable in this action;

NOW, THEREFORE, IT IS HEREBY ORDERED, that Defendant's Motion to Dismiss is denied;

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IT IS FURTHER ORDERED, that Defendant's Motion to Amend Counterclaim, which sought to include an additional cause of action under the Fair Labor Standards Act, 29 U.S.C. § 211 (c), is denied.

DATED this 15th day of Feb. 2003.

s/ Ronald J. Wilper
Ronald J. Wilper
District Judge

APPENDIX 37 – LETTER FROM ADA COUNTY BOARD OF COMMISSIONERS DATED JULY 2, 2003, DENYING PETITIONER THE RIGHT TO A DUE PROCESS HEARING TO ADDRESS THE WRONGFUL TERMINATION OF HER CLASSIFIED EMPLOYMENT

July 2, 2003

Vernon K. Smith
Attorney at Law
1900 W. Main Street
Boise, ID 83702

RE: Petition for Hearing and Review – Stacy A. Gibson

Dear Mr Smith:

On June 4, 2003, this office received a document entitled "Petition for Hearing and Review of Staff (Ada County Personnel Hearing Officer) Recommendation for Employment Termination of Stacy A. Gibson, Ada County Jail Technician." This Board is unable to hold a hearing as requested on page 28, paragraph 1.

The Idaho Constitution and case law make it clear that constitutionally created, county elected officials each have the sole authority to hire and fire their own deputies. A Board of County Commissioners has no legal authority to review the employment decisions of other county elected officials, including an elected Sheriff. Thus, this Board is without legal authority to review Sheriff Killeen's termination of Ms. Gibson's employment with the Ada County Sheriff's Office. *See, Barth v. Canyon County*, 128 Idaho 707 (1996).

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The Idaho Supreme Court decision in *Gibson v. Ada County Sheriff's Department*, Docket No. 27605, mentions an appeal of the Personnel Hearing Officer decision to the Board of County Commissioners. However, this would only apply in the instance of an employee employed under the Board of County Commissioners, rather than under a different elected official.

Additionally, this Board declines your request to employ outside counsel in this matter and has consulted with its own legal counsel to the extent necessary.

Sincerely,

Board of Ada County Commissioners

s/ Judy M. Peavey-Derr
Judy M. Peavey-Derr, Chairman

s/ Rick Yzaguirre
Rick Yzaguirre, Commissioner

s/ Fred S. Tilman
Fred Tilman, Commissioner

cc: Kelli B. Ketlinski
Patti Powell, Legal Advisor to the Sheriff

APPENDIX 38 – OPINION OF THE IDAHO SUPREME COURT, FILED MAY 28, 2003

IN THE SUPREME COURT
OF THE STATE OF IDAHO

Docket No. 27605

139 Idaho 5, 72 P.3d 845 (2003)

Boise, December 2002 Term

Filed: May 28, 2003

Rehearing Denied: July 17, 2003

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Kathryn A. Sticklen, District Judge.

The judgment of the district court is vacated and this matter is dismissed without prejudice.

Vernon K. Smith Jr., Boise, argued for appellant.

Greg H. Bower, Ada County Prosecutor, Boise, for respondent. Kelli B. Ketlinski argued.

KIDWELL, Justice.

The Ada County Sheriff's Department (ACSD) terminated Stacy Gibson (Gibson) for making material misstatements on official records, detrimental conduct, and conduct unbecoming of a county employee. Gibson sought administrative review. The county personnel hearing officer affirmed the ACSD's decision. The district court reviewed and affirmed the county

personnel hearing officer's findings of fact and conclusions of law. Gibson appeals.

I.

FACTS AND PROCEDURAL BACKGROUND

On July 23, 1997, Gibson began working for the ACSD as a Records Technician II (records tech). The ACSD paid Gibson a base salary of $1,500 per month plus overtime. Gibson made it through her probationary period and became a tenured employee terminable only for cause.

Approximately one week prior to receiving each of her paychecks, Gibson signed a pay voucher stating:

> **I STATE THAT THIS CLAIM HAS BEEN EXAMINED BY ME AND NO OTHER HOURS OR MONIES ARE DUE ME FOR OVERTIME. . . . I REALIZE SIGNING THIS CLAIM AUTHORIZES THE COUNTY TO PAY ME THE AMOUNT SHOWN AND THAT A GRIEVANCE MAY BE FILED WITHIN 5 DAYS IF I DISAGREE WITHOUT LOSS OF ANY PAY.**

In May 1998, Gibson submitted an Automatic Paycheck Deposit Authorization in order to participate in the ACSD's direct deposit program. It authorized the ACSD to "initiate credit entries and, if necessary, debit entries and adjustments for any credit entries in error to [her] account. . . ." Thereafter, Gibson did not receive a traditional paycheck. Gibson did, however, continue to receive and sign pay vouchers approximately one week prior to each payday.

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In fall 1998, at Gibson's request, the ACSD made her a Jail Technician II (jail tech). As a jail tech, the ACSD paid Gibson $1,550 per month plus overtime, a $50 per month increase over her base salary as a records tech. In the course of changing Gibson's pay rate, an error occurred. The error combined Gibson's base pay for the jail tech and records tech positions. As a result, beginning with her pay for November 1998, the ACSD paid Gibson her base pay for her jail tech position, $1,550, plus base pay for the records tech position, $1,500, and overtime. From November 1998 through June 1999, Gibson signed pay vouchers authorizing the ACSD to pay her $3,050, plus overtime equaling $100 to $700, per month. The ACSD paid in accordance therewith.

In June or July 1999, the ACSD discovered that it had overpaid Gibson $12,000 over the course of eight months. Believing that Gibson's act of signing pay vouchers authorizing the overpayments for eight months might constitute a crime, the ACSD assigned Detective Arvinn Glenn (Glenn) to investigate the matter.

On July 20, 1999, Glenn summoned Gibson to his office. When asked what the base salary for a jail tech was, Gibson responded that it was $1,550 per month. Then, Glenn asked Gibson what she was paid. Gibson stated, "I have no idea. I mean, I sign my cards, I never pay attention to [th]em. I work so much overtime. . . . I been putting in sixty, who knows, how many hours of overtime." Gibson also stated that she didn't ever balance her checkbook; rather, she would call the bank a couple of times a month to check her balance and avoid overdrafts. Also, when Gibson was a records tech, she carefully reviewed her pay vouchers and reported errors. After reassignment as a jail tech, however, she discontinued this practice.

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The ACSD concluded that Gibson had knowingly signed pay vouchers indicating that her base salary was $3,050 when she knew her base salary was only $1,550. On August 2, 1999, Sheriff Vaughn Killeen (Killeen) sent Gibson a letter expressing his intent to terminate her on the grounds that she: (1) conducted herself in a "manner as to be detrimental to the good order and discipline of the department;" (2) "made a materially misleading statement in an official report;" and (3) "conducted [her]self in such a manner as to reflect unfavorably on th[e] department and [her]self." The letter stated that the facts giving rise to Gibson's termination were: (1) she knowingly accepted salary overpayments; and (2) she did nothing to correct the overpayments or repay the monies erroneously paid to her. The letter also advised Gibson of her right to appeal.

Gibson appealed. The Ada County personnel hearing officer heard the matter on January 25 and 26, 2000. On February 17, 2000, the hearing officer's findings of fact, conclusions of law and decision affirmed Killeen's decision to terminate Gibson. The hearing officer found Gibson's conduct "detrimental to the good order and discipline in the (ACSD) department or office, or conduct unbecoming of a county employee" in violation of Ada County Code (ACC) § 1-7G-3A(5). The hearing officer also found that Gibson's conduct violated ACSD Policy Manual § 9.04 because it could bring the ACSD into disrepute. The hearing officer, however, found that Gibson did not violate ACC § 1-7G-3A(20) — allowing termination for material misrepresentations in "official reports" because the pay vouchers did not constitute "official reports."

Gibson sought judicial review of the county personnel hearing officer's decision pursuant to A.C.C. § 1-7(G)-3(o) on the grounds that she was denied due process, the hearing

officer's findings were not based on substantial, competent evidence, and the decision was arbitrary and capricious. The district court addressed the matter under the standard of review set forth in the Idaho Administrative Procedure Act (IAPA), I.C. §§ 67-5277 and -5279, and affirmed the hearing officer's decision.

Gibson timely filed this appeal.

II.

ANALYSIS

A. The Idaho Administrative Procedure Act Does Not Govern This Action.

The IAPA and its judicial review standards apply to agency actions. I.C. §§ 67-5201, -5270.

> "Agency" means each state board, commission, department or officer authorized by law to make rules or to determine contested cases, but does not include the legislative or judicial branches, executive officers listed in section 1, article IV, of the constitution of the state of Idaho in the exercise of powers derived directly and exclusively from the constitution, the state militia or the state board of correction.

I.C. § 67-5201(2). This Court has held that "[t]he language of the IAPA indicates that it is intended to govern the judicial review of decisions made by state administrative agencies, and not local governing bodies." *Idaho Historic Preservation Council v. City Council of Boise*, 134 Idaho 651, 653, 8 P.3d 646, 648 (2000); *see also Petersen v. Franklin County*, 130

Idaho 176, 182, 938 P.2d 1214, 1220 (1997); *Arthur v. Shoshone County*, 133 Idaho 854, 859, 993 P.2d 617, 622 (Ct.App. 2000). Counties and city governments are considered local governing bodies rather than agencies for purposes of the IAPA. *Idaho Historic Preservation Council*, 134 Idaho at 653, 8 P.3d at 648; *Petersen*, 130 Idaho at 182, 938 P.2d at 1220; *Arthur*, 133 Idaho at 859, 993 P.2d at 622.

Though the IAPA and its judicial review provisions are generally inapplicable to local government actions, a statute may provide for judicial review of local government actions pursuant to the IAPA. *Idaho Historic Preservation Council*, 134 Idaho at 653-54, 8 P.3d at 648-49; *see Petersen*, 130 Idaho at 182, 938 P.2d at 1220. Absent a statute invoking the IAPA's judicial review provisions, local government actions may not be reviewed under the IAPA. *Idaho Historic Preservation Council*, 134 Idaho at 653-54, 8 P.3d at 648-49.

B. A County Personnel Hearing Officer's Action Is Not Subject To Judicial Review Pursuant To I.R.C.P. 84.

Statutes may also authorize judicial review without invoking the provisions of the IAPA. I.R.C.P. 84(a)(1). The rule, however, states "actions of a local government, [or] its officers . . . are not subject to judicial review unless expressly authorized by statute." I.R.C.P. 84(a)(1). There is no statute authorizing judicial review of a decision by the county personnel hearing officer. Therefore, this matter is not subject to review pursuant to I.R.C.P. 84.

Idaho Historic Preservation Council might appear, at first glance, to support application of the general standards of judicial review found in I.R.C.P. 84(a)(1) to this matter. *Idaho Historic Preservation Council* is, however, distinguishable

from this case. In *Idaho Historic Preservation Council*, the council petitioned for review of a decision of the Boise city council. 134 Idaho at 652, 8 P.3d at 647. The district court determined that the IAPA provided the correct standard of review for the matter. *Id.* This Court found that the IAPA was inapplicable, nonetheless it proceeded to review the matter using the generally applicable standards of review under I.R.C.P. 84(a)(1). *Id.* The distinction between this matter and *Idaho Historic Preservation Council* was that the Idaho Preservation of Historic Sites Act, the controlling law in *Idaho Historic Preservation Council*, expressly authorized judicial review. *See* I.C. § 67-4610. In the present matter, there is no statute authorizing judicial review. Without such a statute, the approach in *Idaho Historic Preservation Council* is inapplicable.

Notably, had Gibson appealed the county personnel hearing officer's decision to the Ada County Board of Commissioners (board), the board's decision would be an appropriate subject for judicial review and the IAPA standard of review would apply. I.C. § 31-1506(1). Without action of the board, however, the judicial review provisions of I.C. § 31-1506(1) are inapplicable.

C. A County Ordinance Cannot Authorize Judicial Review.

ACC § 1-7G-3(o) states that a party may "appeal the decision" of the hearing officer "to the District Court of the Fourth Judicial District. . . ." Notably, this reference to "appeal" comes after an explicit reference to the IAPA in ACC § 1-7G-3(m). Thus, read in context, the reference to "appeal" in ACC § 1-7G-3(o) contemplates judicial review under the IAPA.

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Whether ACC 1-7G-3(o) may authorize judicial review pursuant to the IAPA depends on whether the County was empowered to make such a law. Article XII, § 2 of the Idaho Constitution and I.C. § 31-604 govern a county's power to make law. Article XII, § 2 states: "Any county . . . may make and enforce, within its limits, all such local police, sanitary and other regulations as are not in conflict with its charter or with the general laws." The appeal provision of ACC 1-7G-3(o) does not appear to be a "police, sanitary [or] other regulation" as the terms are used in the Idaho Constitution. Additionally, the IAPA judicial review provisions apply only to agency decisions. The Legislature has defined "agency" to exclude decisions made by county hearing officers. I.C. § 67-5201(2); *Idaho Historic Preservation Council*, 134 Idaho at 653, 8 P.3d at 648; *Petersen*, 130 Idaho at 182, 938 P.2d at 1220; *Arthur*, 133 Idaho at 859 993 P.2d at 622. Thus, any attempt by the county to authorize judicial review of a personnel hearing officer's decision is infirm because it conflicts with the general laws of this State.

ACC 1-7G-3(o) also cannot authorize judicial review pursuant to I.R.C.P. 84. Rule 84 requires that a statute authorize judicial review ACC 1-7G-3(o) is not a "statute" within the meaning of I.R.C.P. 84 and thus cannot authorize judicial review. Because ACC 1-7G-3(o) is not a statute, yet it attempts to authorize judicial review of a personnel hearing officer's decision, it conflicts with I.R.C.P. 84 and is, therefore, infirm.

D. This Case Is Not Appropriate For Remand Because Gibson's "Notice Of Appeal Of Decision Of Ada County Personnel Hearing Officer" Cannot Be Read As A Complaint.

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In *Gillespie v. Mountain Park Estates L.L.C.*, this Court recently stated:

> Generally, a claim for relief need contain only a short and plain statement of the claim showing that the pleader is entitled to relief. . . . A party's pleadings should be liberally construed to secure a just, speedy and inexpensive resolution of the case. With the advent of notice pleading, a party is no longer slavishly bound to stating particular theories in its pleadings. Rather, a complaint need only state claims upon which relief may be granted. . . . The emphasis . . . is to insure that a just result is accomplished, rather than requiring strict adherence to rigid forms of pleading.

2002 WL 31260036 at *2 (2002) (internal citations and quotations omitted); I.R.C.P. 8. The key issue in determining the validity of a complaint is whether the adverse party is put on notice of the claims brought against it. *Id.* at *3.

Though this Court will make every intendment to sustain a complaint that is defective, e.g., wrongly captioned or inartful, a complaint cannot be sustained if it fails to make a short and plain statement of a claim upon which relief may be granted. Here, even read broadly, Gibson's "notice of appeal" filed with the district court fails to provide notice of any claim against the ACSD other than a claim for judicial review of the hearing officer's decision. Thus, this court cannot sustain it as a complaint under I.R.C.P. 8.

E. The ACSD Is Not Entitled To Attorney Fees Or Costs On Appeal.

The ACSD has not prevailed on the merits in this matter. In fact, it is the infirm appeal provision of A.C.C. § 1-7G-3(o), incorrectly instructing Gibson to appeal the decision of the county personnel hearing officer to the district court, which has prevented this Court from addressing the merits of this matter. As a result, the matter is dismissed *without prejudice* and the ACSD is not a prevailing party entitled to attorney fees or costs on appeal.

III.

CONCLUSION

Decisions of a county personnel hearing officer are not subject to judicial review pursuant to IAPA or any other statutory provision. A county ordinance cannot authorize judicial review of a county personnel hearing officer's decision because such an ordinance is infirm under Article XII, § 2 of the Idaho Constitution and I.C. § 31-604. Gibson's "notice of appeal" seeking judicial review is not appropriate for remand because it is insufficient to place the ACSD on notice of any claims against it on which Gibson may have been granted relief, aside from judicial review. Thus, this matter is dismissed without prejudice.

No attorney fees or costs are awarded.

Chief Justice TROUT and Justices SCHROEDER, WALTERS, and EISMANN concur.

APPENDIX 39 – AFFIDAVIT OF FORMER ADA COUNTY COMMISSIONER, SHARON M. ULLMAN, DATED JANUARY 30, 2003, VERIFYING ADA COUNTY'S ONGOING FLSA NONCOMPLIANCE AND NEED TO ADDRESS THE MATTER

AFFIDAVIT OF SHARON M. ULLMAN

STATE OF IDAHO)
:ss
COUNTY OF Ada)

COMES NOW Sharon M. Ullman, former Ada County Commissioner, District I, and being first duly sworn upon oath, deposes and says as follows:

1. That Affiant was duly elected to the Board of Commissioners (Board), District I seat, Ada County, Idaho in November 2000; that Affiant took office on January 8, 2001; that Affiant's last full day in office was January 12, 2003.

2. That Affiant presents this Affidavit upon her own knowledge, direct conversations and personal participation with Ada County officials, and in conjunction with her official duties as an Ada County Commissioner, District I seat, Ada County, Idaho.

3. That Affiant has personal knowledge of Idaho Code, § 31-801 *et seq.*, which defines the Powers and Duties of the Board of Ada County Commissioners; that Affiant was a member of that Board; that in accordance with that statute, § 31-816, Idaho Code, the Board is required, "To fix the compensation of all county officers and employees, and provide for the payment of the same".

4. That Affiant has personal knowledge of Idaho Code, § 31-809, which requires the Board "To examine and audit the accounts of all officers having the care, management, collection or disbursement of moneys belonging to the county, or appropriated by law, or otherwise, for its use and benefit."

5. Affiant has personal knowledge of Idaho Code, § 31-810, wherein the Board is required to pay claims against the County, and those claims do include compensation for all County employees for wages, salaries, overtime, compensatory time, flexible time, and all other disbursements relating to Ada County employment.

6. That Affiant would state that to the best of Affiant's knowledge, and based upon controlling Federal and State law, Ada County is an employer pursuant to and controlled by the provisions of the *Fair Labor Standards Act* (FLSA).

7. That Affiant was informed by Theodore Argyle, Chief Civil Deputy Prosecuting Attorney for Ada County, in early 2001 that Ada County was out of compliance with various provisions of the *Fair Labor Standards Act* including such items as record-keeping requirements and overtime computation and disbursements. It was duly determined that Ada County officials were going to attempt to bring all County Departments into compliance with the *Act*.

8. Affiant did attend a seminar, along with other Ada County employees, department heads and other elected officials; this seminar was presented by Theodore Argyle and another Ada County Deputy Civil Attorney concerning the *Fair Labor Standards Act*, held at Western Town on the grounds of the Western Idaho Fair, on the 18th day of May,

2001. It was deemed to be quite important at that time to educate the County officials (including Affiant) about the need to understand and perform Ada County's FLSA obligations and responsibilities to Ada County employees. Ada County was required to discharge its duty as an FLSA employer, or face legal consequences. During this seminar, Mr. Argyle emphasized to us repeatedly there is ***no defense*** for an FLSA violation, and for that reason he stressed the need for all Ada County Departments to act in accordance with the *Fair Labor Standards Act*.

9. Affiant first became aware that Ada County, as an employer, was possibly committing FLSA violations when an Ada County employee brought the subject to my attention, approximately six or eight months prior to my taking office in January 2001. At the time the possible FLSA violations were first brought to Affiant's attention by the Ada County employee, Affiant informed the employee there was nothing I could do until I took office as an elected commissioner. Shortly after taking office, I began to question our legal staff in the Civil Division about the concern and possibility of County FLSA violations. Affiant's questions, along with the subsequent events of filing an FLSA complaint by another employee, led to the internal examination of the County's payroll practices by the legal staff.

10. Affiant cannot confirm the exact duration of time during which Ada County had been out of compliance with the *Fair Labor Standards Act*, but the County did officially recognize all Departments were in an ongoing state of FLSA non-compliance, and it was for that reason, effective no later than January 10, 2002, the County made major changes in the method and means by which the Departments would process their employee wage records, record keeping and

disbursements, and how that was to be accomplished. The changes included the long overdue removal of the mandatory signature required on a "pay voucher", or "claim form", from all of the County employees. That change made it no longer required to sign "pay vouchers" or "claim forms" since the effective date of the changes, being no later than January 10, 2002.

Dated this 30th day of January 2003.

s/ Sharon M. Ullman
Sharon M. Ullman

SWORN AND SUBSCRIBED To before me this 30th day of January 2003.

s/ Vernon K. Smith
Notary Public for Idaho
Residing at Boise, Idaho
My Commission Expires: 12/20/06

APPENDIX 40 – MEMORANDUM REGARDING NEW PAYROLL SYSTEM FROM ADA COUNTY SHERIFF, VAUGHN KILLEEN, TO ALL SHERIFF'S OFFICE PERSONNEL, DATED JANUARY 9, 2002

MEMORANDUM

DATE: January 9, 2002

TO: All Personnel

FROM: Sheriff Vaughn Killeen

SUBJECT: Payroll Update

As you are all aware, we began a new payroll system on December 16. While the intent was noble and meant for the benefit of the employees, the transition to it has been rather problematic. We are trying to overcome the issues, but until then I wanted to clarify what you can expect.

- Everyone is now an hourly employee and will receive a check every other Friday, beginning January 11. That check will include the exact number of hours you worked in the prior pay period (December 16 – December 29 was the first one) and any paid overtime accrued during that period. Because you are now paid hourly, it is very important that you make sure all of your hours are recorded. If there is pre-approved administrative leave time, such as when you attend training for 8 hours and your shift would have been 10, the approved number of hours are entered. If only 8 hours are recorded for that day, you will be two hours short in your paycheck.

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- Two great benefits that are being added because of this. The first is that the County is paying you twice for December 16 through December 29. You already received a full paycheck for December and are going to get paid again for those two week on January 11. In reality though, you won't have the extra money in hand until you terminate your employment because you will receive a check after termination that you would not have received otherwise. The second benefit is that when you exceed the maximums on sick time and vacation time, those hours now roll over to the Post Employment Health Program and pay insurance premiums after you terminate your employment. Sick time rolls at 40% of value and vacation time at 100%. With the rising costs of health care, this is a great enhancement to our benefit plan.

- Your normal benefit time (vacation, sick and holiday) and your compensatory time will print out with your check, but it will not be accurate. The Finance Office will distribute a Monthly Time Report along with the checks. That record should be accurate and that is the one to check.

We are striving to work the bugs out of the new system. Until that time, please be patient and realize that we have no control over most aspects of this system. If you have questions about timekeeping, please contact your supervisor and proceed through your chain of command if possible. If they remain unresolved or if your paycheck is obviously incorrect, please contact Geneva Usog at 6787 or Kelli Bolicek or 6701.

APPENDIX 41 – LETTER FROM THE ADA COUNTY PROSECUTOR'S OFFICE TO THE BOARD OF ADA COUNTY COMMISSIONERS DATED FEBRUARY 12, 2001, REGARDING NEED FOR COUNTY COMPLIANCE WITH FLSA

CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATION

February 12, 2001

ADVICE NO. W-8712

Board of Ada County Commissions
650 Main Street
Boise, Idaho 83702

RE: FLSA Compliance and Payroll Change

Dear Commissioners:

Attached to this letter is a table listing five different options and the material consequences of each for our discussion about FLSA compliance and payroll periods tomorrow morning.

The workgroup that has been studying the issue recommends Option #2 be implemented, either at the commencement of the new fiscal year or at the commencement of the new calendar year concurrent with move in at the new courthouse.

I believe that Dave Navarro and Terry Johnson will be present to provide further information on payroll, accounting, and personnel consequences for use in your deliberations on the matter.

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We will also discuss the implications of FLSA compliance as it relates to each of these options. These particulate discussions involve liability and should be done in executive session.

Very truly yours,

GREG H. BOWER
Ada County Prosecuting attorney at law

By: Theodore E. Argyle
Chief Civil Deputy

TEA:kks

Enclosure

Appendix 41

PAYROLL AND FLSA COMPLIANCE OPTIONS WHITE PAPER

OPTION #1
Full Compliance and Standardization
(The Perfect Legal World)

Proposal	Advantages	Disadvantages	Potential Costs to Implement	Comments
Hourly Employees. All hourly employees turn in time and are paid an hourly wage for the number of hours worked.	Solves all current FLSA compliance issues. Always pay the right amount and sick and vacation are accurate. Can be automated. Saves retroactive adjusting time. Can add time and attendance which is currently an issue.	Every department and division will have to keep track of hours worked.	Payroll programming and a timekeeping system. Approximately 1 month to reprogram to add time and attendance.	We should be doing this anyway. We are not in complete technical compliance with FLSA.
Overtime. Eliminate the 7K exemption Countywide. Overtime is computed after forty hours per week.	Simple, easy to use rule that all departments and divisions can follow. Training is easy.	Disrupts law enforcement and other security cultures.	Additional pay for detention overtime. Probably no extra for the Sheriff since he pays OT after 10 hours each day.	Only two rules to program and learn.
Pay Period. 26 pay periods per year lagging time earned by 2 weeks.	Helps retain lower wage entry level employees where turnover is highest	Some additional expense to process.	Additional processing cost absorbed by the Clerk. One time payroll cost to covert in the amount of $256,000.00. Annual loss of interest earnings of $50,000.	
Exempt Employees. Exempt employees draw 1/26th of their annual salary each pay period	Neutral	Neutral	Additional processing cost?	
Implementation Date. Commence 1/1/2002	Dovetails nicely into the personnel reform currently being examined by the elected officials and move to the new courthouse.	Continuing potential exposure to FLSA liability until implemented.		

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OPTION #2
Full Compliance w/ partial 7K for Security Services
(The Perfect Practical World)

Proposal	Advantages	Disadvantages	Potential Costs to Implement	Comments
Hourly Employees. All hourly employees turn in time and are paid an hourly wage for the number of hours worked.	Solves all current FLSA compliance issues. Always pay the right amount and sick and vacation are accurate. Can be automated.	Every department and division will have to keep track of hours worked.	Payroll programming and a timekeeping system. Approximately 1 month to reprogram to add time and attendance.	We should be doing this anyway. We are not in complete technical compliance with FLSA.
Overtime. Overtime is computed after forty hours per week. Leave a 14 day 7K provision for security services.	Still reasonably simple, easy to use rule that all departments and divisions can follow.	Some more modest amount of disruption to law enforcement. More scheduling flexibility for law enforcement than Option #1, but less than Option #3.	Less than Option #1.	3 rules to learn and program.
Pay Period. 26 pay periods per year lagging time earned by 2 weeks	Helps retain lower wage entry level employees where turnover is highest	Some additional expense to process.	Same as above.	
Exempt Employees. Exempt employees draw 1/26th of their annual salary each pay period	Neutral	Neutral	Same as above.	
Implementation Date. Commence 1/1/2002	Dovetails nicely into the personnel reform currently being examined by the elected officials and move to the new courthouse.	Continuing potential exposure to FLSA liability until implemented.		

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OPTION #3
Full Compliance with full 7K for Security Services

Proposal	Advantages	Disadvantages	Potential Costs to Implement	Comments
Hourly Employees. All hourly employees turn in time and are paid an hourly wage for the number of hours worked.	Solves all current FLSA compliance issues. Always pay the right amount and sick and vacation are accurate. Can be automated.	Every department and division will have to keep track of hours worked.	Payroll programming and a timekeeping system. Approximately 1 month to reprogram to add time and attendance.	We should be doing this anyway. We are not in complete technical compliance with FLSA.
Overtime. Overtime is computed after forty hours per week for all but security services.	Simple, easy to use rule that all departments and divisions can follow. More flexibility in scheduling for law enforcement than with Option #2.	Disrupts law enforcement and other security cultures.	None.	
Pay Period. 26 pay periods per year for all but 7K employees, logging time earned by 2 weeks. 7K would have 13 pay periods.	Helps retain lower wage entry level employees where turnover is highest	Some additional expense to process and some additional expenses for two time systems.	Same as above.	4 rules to learn and program.
Exempt Employees. Exempt employees draw 1/26th of their annual salary each pay period			Same as above.	
Implementation Date. Commence 1/1/2002	Dovetails nicely into the personnel reform currently being examined by the elected officials and move to the new courthouse.	Continuing potential exposure to FLSA liability.		

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OPTION #4
Full Compliance with Monthly Pay Periods

Proposal	Advantages	Disadvantages	Potential Costs to Implement	Comments
Hourly Employees. All hourly employees turn in time and are paid an hourly wage for the number of hours worked.	Solves all current FLSA compliance issues. Can be automated. Does not solve month end time and attendance problems.	Every department and division will have to keep track of hours worked. Overtime, sick and vacation must be adjusted retroactively.	Payroll programming and a timekeeping system. Approximately 1 month to reprogram to add time and attendance.	We should be doing this anyway. We are not in complete technical compliance with FLSA.
Overtime. Eliminate the 7K exemption Countywide. Overtime is computed after forty hours per week.	Simple, easy to use rule that all departments and divisions can follow. Does require a cutoff for overtime which doesn't get picked up for a month.	Disrupts law enforcement and other security cultures.	Additional pay for detention overtime. Probably no extra for the Sheriff since he pays OT after 10 hours each day	
Pay Period. Same as current.	Helps retain lower wage entry level employees where turnover is highest	Some additional expense to process.		
Exempt Employees. Same as current Practice	Neutral	Neutral		
Implementation Date. Commence 1/1/2002	Dovetails nicely into the personnel reform currently being examined by the elected officials and move to the new courthouse.	Continuing potential exposure to FLSA liability.	Costs of litigation, back pay, and fines when FLSA is not complied with.	

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OPTION #5
Do Nothing Except Address Issues as They Arise

Proposal	Advantages	Disadvantages	Potential Costs to Implement	Comments
Hourly Employees. All hourly employees turn in time and are paid an hourly wage for the number of hours worked.	Solves all current FLSA compliance issues for regular employees if continual training is done. 7K pay periods are almost impossible to match with a monthly pay period.	Every department and division will have to keep track of hours worked. Paychecks will fluctuate from month to month. Overtime, sick and vacation must be adjusted retroactively.	Payroll programming and a timekeeping system. Additional cost to correct time entries retroactively.	We should be doing this anyway. We are not in complete technical compliance with FLSA.
Overtime. Same as current practice except correct problems.	No Change from current practice.	The 7K exemption is extremely difficult to learn and keep track of on a monthly pay system resulting in constant problem solving.	None, except for current problem areas and the ongoing potential for further noncompliance costs.	
Pay Period. 12 per year.	Does not require change.	Does not address turnover and aid in recruitment of entry-level employees.	None.	
Exempt Employees. Same as current practice.	Neutral	Neutral	None	
Implementation Date. As soon as practical.	Can commence ad hoc solutions promptly.	Continuing potential exposure to FLSA liability from turnover in accounting personnel and difficulty coordinating differing pay and compliance periods.	Costs of litigation, back pay, and fines when FLSA is not complied with.	

APPENDIX 42 – LETTER TO PETITIONER FROM DIRECTOR OF IDAHO DEPARTMENT OF LABOR, ROGER B. MADSEN, DATED FEBRUARY 23, 2000, STATING THE DEPARTMENT HAS NO AUTHORITY TO INVESTIGATE WAGE CLAIMS AGAINST PUBLIC AGENCIES [ADA COUNTY], AND GIBSON SHOULD SEEK RECOVERY UNDER PROVISIONS OF THE FAIR LABOR STANDARDS ACT, 29 U.S.C. § 201 *ET SEQ.*

February 23, 2000

Ms. Stacy A. Gibson
5501 Tinker St.
Boise, ID 83709

Dear Ms. Gibson:

I reviewed your letter, dated February 16, 2000, requesting that the Department investigate six separate wage claims you are alleging against Ada County, your former employer. You asked that the Department investigate you wage claims pursuant to Idaho's Claims for Wages Act, Idaho Code § 45-601 *et seq*. However, the provisions of this Act do not apply to public employers. Therefore, this Department has no authority to conduct a wage claim investigation against Ada County.

The federal Fair Labor Standards Act, 29 U.S.C. § 201 *et seq*., does apply to both public and private employers. If you believe that Ada County has violated the provisions of this federal law, then you should file your claims with the United States Department of Labor, Wage and Hour Division, 1150 N. Curtis Road, Suite 200, Boise, Idaho 83706.

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I am sorry the Department could not be of assistance to you.

Respectfully yours,

s/ Roger B. Madsen
Roger B. Madsen
Director

APPENDIX 43 – LETTER FROM PETITIONER'S COUNSEL TO ADA COUNTY SHERIFF DATED FEBRUARY 18, 2000, DEMANDING ADA COUNTY PAY PETITIONER ALL WAGES TO WHICH SHE IS ENTITLED, INCLUDING EARNINGS OWED FROM COUNTY'S BREACH OF EMPLOYMENT CONTRACT

February 18, 2000

Mr. Vaughn Killeen
Ada County Sheriff's Office
7200 Barrister
Boise, Idaho 83704

RE: Stacy Gibson

Dear Sheriff Killeen:

Pursuant to Idaho Code Sections 45-606, 607, 609 and 610, Ms. Gibson does herewith give notice to your Department that ALL wages due and owing her, including those periods of earnings to which she is entitled due to the County's breach of agreement, shall be processed, and forwarded to my office, no later than the close of business on Thursday, February 24, 2000.

By this letter, you are given notice that should the above requested wages not be processed and delivered, Ms. Gibson will file a formal wage claim with the Director of the Idaho Department of Labor, in accordance with Idaho Code, Section 45-617.

s/ Vernon K. Smith
Vernon K. Smith

APPENDIX 44 – LETTER FROM STEPHEN E. SPENCER, M.D. TO IDAHO STATE BOARD OF MEDICINE, DATED FEBRUARY 3, 2000, ADVISING THE SHERIFF'S LEGAL ADVISOR, R. MONTE MACCONNELL, WAS INTENTIONALLY DISTORTING INFORMATION CONCERNING GIBSON

Patient Name: GIBSON, STACY A.

Date of Birth: 08/30/1958

February 3, 2000

RE: Stacy A. Gibson

Dear Ms. Leonard:

I received a copy of a letter addressed to you from Vaughn Killeen, Ada County Sheriff via R. Monte McConnell, legal advisor to the sheriff and dated January 28, 2000. The content of this letter intentionally distorts information that I have required to present on behalf of Mrs. Gibson. Mrs. Gibson has been the target of some very serious allegations which greatly impact her future and livelihood. The actions taken against Mrs. Gibson by the county have had a devastating impact on her emotional well-being. This woman is an extremely caring, thoughtful and sensitive person. She has genuinely been severely depressed and terribly anxious and anguished over this predicament. If she had been dealt with in an understanding and supportive way from the beginning, this issue probably would have been promptly resolved. Unfortunately, those in a position of authority chose to attack and impugn her, leaving her powerless to help resolve this issue quickly. The net result was the need for legal

representation on her part. The county has been unwilling to provide information necessary for her legal defense and one has to wonder what they are hiding. Mr. and Mrs. Gibson through their attorney have repeatedly requested records of a medical evaluation performed by Dr. Charles Steuart and they have been denied this information. This letter suggests that there is no written documentation of that evaluation which is unfathomable given the seriousness of the circumstance requiring this evaluation. If a permanent record of this interaction does exist, then perhaps the Gibson's have a legal right to review that with their attorney as any patient does have with their medical record.

Yours truly,

s/ Stephen E. Spencer, M.D.
STEPHEN E. SPENCER, MD
SS: ar
D/D: 02/04/2000
T/D: 02/04/2000

APPENDIX 45 – LETTER FROM ADA COUNTY PROSECUTOR'S OFFICE TO PETITIONER'S COUNSEL DATED JANUARY 7, 2000, ADDRESSING APPEAL PROVISIONS OF ADA COUNTY MERIT SYSTEM, CLAIMING PETITIONER WAS OBLIGATED TO SIGN PAYROLL VOUCHERS WITHIN FIVE DAYS, AND DENYING PETITIONER WAGES AFTER AUGUST 24, 1999

January 7, 2000

HAND DELIVERED

Vernon K. Smith, Esq.
1900 W. Main Street
Boise, Idaho 83702

RE: Stacy A. Gibson, Notice of Appeal of Decision to Terminate Employment

Dear Mr. Smith:

Ada County is in receipt of your client's Notice of Appeal of the Ada County Sheriff's decision to terminate Ms. Gibson's employment with the Ada County Sheriff's Office. As required by Ada County Code § 1-7G-3L, the Director of Ada County Human Resources has contacted the Ada County Personnel Hearing Officer, Lance Salladay. If he has not done so already, Mr. Salladay will be contacting your office to schedule the mandatory prehearing conference to determine discovery issues and deadlines. This conference is to be held within forty-eight (48) yours of the county's receipt of a notice

of appeal, unless it is postponed by agreement of both parties and the Personnel Hearing Officer.

Ada County Code § 1-7G-3L requires that the employee appeal the decision. The appeal received by the county was signed by yourself and a Mr. John M. Gibson, indicating that Mr. Gibson holds a power of attorney for Ms. Gibson. Ada County will need verification that Mr. Gibson in fact holds such a valid power of attorney. Please forward a copy of the instrument creating Mr. Gibson's power of attorney for Ms. Gibson to this office.

Regarding Ms. Gibson's claim for wages for dates between July 5, 1999 and January, 2000, Ms. Gibson's status as of August 24, 1999, was "on administrative leave without pay," and she is therefore owed no wages or benefits from that date forward. Ada County did, however, pay her medical insurance and life insurance premiums for the month of September, 1999. If Ms. Gibson received a payroll warrant in either July or August, 1999 which she believed did not match that which she was due, she had an obligation and opportunity to bring that to her supervisor's attention at the time, and for five days following the date, she signed her payroll voucher stating that the amount was correct. In any event, a claim for wages by Ms. Gibson is not ripe at this time. Idaho Code § 45-606 states that wages shall be paid upon termination of employment. Termination of Ms. Gibson's employment will not be effective, if at all, until after the Personnel Hearing Officer renders his decision in this matter.

GREG H. BOWER
Ada County Prosecuting Attorney

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s/ Kelli B. Brauner

BY: Kelli B. Brauner
Deputy Prosecuting Attorney

KBB:by

cc: R. Monte MacConnell

APPENDIX 46 – LETTER FROM ADA COUNTY SHERIFF, VAUGHN KILLEEN, DATED DECEMBER 27, 1999, MISREPRESENTING FACTS AND DUE PROCESS PROVISIONS OF THE ADA COUNTY CODE (MERIT SYSTEM), AND TERMINATING PETITIONER'S CLASSIFIED EMPLOYMENT WITHOUT PROVIDING PETITIONER A *LOUDERMILL* DUE PROCESS HEARING

December 27, 1999

Vernon K. Smith, Esq.
1900 W. Main Street
Boise, Idaho 83702

Re: Stacy Gibson

Dear Mr. Smith:

Pursuant to notice given you on Friday, December 17, I met with you at 2 PM, December 20, 1999, to afford your client, Ms. Gibson the opportunity to address the contemplated disciplinary action of dismissal. Also present at that meeting were Monte MacConnell and Susan Thomas, as my counsel. You asserted that it was still Ms. Gibson's position that she could not subject herself to an informal hearing with me because of her medical condition. You then proceeded to summarize Ms. Gibson's arguments in her defense and suggested an informal meeting between me and Ms. Gibson to resolve this matter.

Upon full consideration of the facts and your proposal for an informal meeting, I do not believe than an informal meeting is

the procedure contemplated by the County Code at 1-7G3, nor do I believe such a meeting would be productive. Ms. Gibson accepted over $8,500.00 in excess salary payments. The overpayments exceeded her correct salary by over $1,000.00 per month, for a period of approximately eight months. She never called this overpayment to the attention of her supervisor or anyone else in authority.

I have considered the facts and issues you have raised on behalf of Ms. Gibson. I cannot accept as exculpatory Ms. Gibson's contention that she simply did not keep track of her bank records or read her payroll statement before signing them. Ms. Gibson has been given five opportunities since August to personally appear and speak to me about this matter. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487 (1985), does not require that an employee appear personally before a contemplated disciplinary action is imposed, only that the employee be given that opportunity. As her counsel, you appeared at the first and last of these scheduled hearings, but she has never attended. Ms. Gibson continues to assert that she is under doctor's care and unable to attend the informal hearing provided for in the County Code. You have appeared on her behalf and eloquently represented her interests as her counsel.

I regret to inform you that I have decided to terminate Ms. Gibson, effective immediately. Ms. Gibson may appeal this decision as provided in Section 1-7G-3.L of the Ada County Code. A complete copy of the relevant Chapter of the Code is enclosed. Ms. Gibson has five days from the delivery of this letter to file her written appeal with the Ada County Personnel Director.

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If you have any questions, please call on me at your convenience.

Sincerely Yours,

s/ Vaughn Killeen

VAUGHN KILLEEN
Ada County Sheriff

cc: Susan Thomas

APPENDIX 47 – MEDICAL RECORDS FROM STEPHEN E. SPENCER, M.D. DATED NOVEMBER 12, 1999, VERIFYING GIBSON WAS MEDICALLY INCAPABLE OF DEFENDING HERSELF AGAINST ALLEGATIONS MADE BY THE SHERIFF

Patient Name: GIBSON, STACY A.

Date of Birth: 08/30/1958

November 12, 1999

To Whom It May Concern

Dear Sir:

Mrs. Gibson has been extremely distraught over allegations of embezzlement brought by the Ada County Sheriff's Office. Between severe anxiety attacks and extreme melancholy, she has not been able to effectively deal with even simple issues in her day-to-day life and is in no frame of mind to defend herself against these allegations at this time. I have known Mrs. Gibson for five years and I have never seen her so distraught until these allegations were brought against her. She feels totally out of control because of manipulation by certain members of the Ada County Sheriff's Office. I think it is possible that if Mrs. Gibson were able to acquire information necessary to defend herself and prove her innocence, she might feel more secure and capable of doing so. However, it appears that certain members of the Ada County Sheriff's Office have chosen to prevent her from accessing requested records for her to do so. It would be my assessment that the continued obstructionism by the Ada County Sheriff's Office will

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perpetuate Mrs. Gibson's insecurity, isolation, anxiety and depression, making it impossible for her to defend herself.

Yours truly,

s/ Stephen E. Spencer, MD

STEPHEN E. SPENCER, MD
SES:kc
D/D: 11/12/99
T/D: 11/12/99

APPENDIX 48 – LETTER FROM SHERIFF'S LEGAL ADVISOR, R. MONTE MACCONNELL, DATED AUGUST 25, 1999, PLACING GIBSON ON ADMINISTRATIVE LEAVE WITHOUT PAY, IN VIOLATION OF ADA COUNTY CODE § 1-7G-3B (5), AND TERMINATING PETITIONER'S MEDICAL BENEFITS

August 25, 1999

Vernon K. Smith, Esq.
1900 W. Main Street
Boise, Idaho 83702

Re: Stacy Gibson

Dear Mr. Smith:

I have received your letter of August 24, 1999. In keeping with our agreement, as of close of business on August 24, Ms. Gibson will be on Administrative Leave without pay pending her recovery enough to appear at an informal hearing with the Sheriff. The purpose of the hearing will be to permit her the opportunity to explain her position regarding the Sheriff's stated intent to terminate her from employment with this department. This meeting will be considered a continuation of the hearing on August 23, at which you presented to Sheriff Killeen Ms. Gibson's version of the events giving rise to the Notice of Intent to Terminate.

As you can appreciate, the Sheriff would like to conclude this matter as soon as possible. Please contact me to discuss dates for the meeting.

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You mentioned Ms. Gibson's medical benefits and life insurance in your letter. Those benefits have been paid through September. After that she will have to pay the premiums in order to maintain the policies.

As before, please feel free to contact me if you have any questions.

Sincerely Yours,

VAUGHN KILLEEN
Ada County Sheriff

s/ R. Monte MacConnell

By: R. Monte MacConnell
Legal Advisor to the Sheriff

CC: Susan Thomas

APPENDIX 49 –LETTER FROM GIBSON'S COUNSEL TO THE SHERIFF'S LEGAL ADVISOR, DATED AUGUST 24, 1999, ADDRESSING WHAT CONDITIONS GIBSON WOULD CONSENT TO ADMINISTRATIVE LEAVE WITHOUT PAY

August 24, 1999

Ada County Sheriff's Office
7200 Barrister
Boise, Idaho 83704

ATTN:R. Monte MacConnell

RE: Stacy Gibson

Dear Mr. MacConnell:

Pursuant to our discussion on August 23, 1999, at approximately 3:00 p.m., I spoke with Stacy and John Gibson and they concur that effective, August 24, 1999, Ms. Gibson will agree to be on Administrative Leave, without pay, but continue with the medical coverage and benefits associated with her Group Medical Coverage and Life Insurance, as she is currently under medical care and may require additional short-term medical disability as a result of the stress created by this employment issue. This status will then continue, pending the rescheduling of this hearing, thereby allowing her to be released by the doctor to participate in these proceedings. We anticipate she will be available in late September-early October, subject to doctor's approval. If you have further questions, please so advise, until then, I remain,

Yours very truly,

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/s/ Vernon K. Smith
Vernon K. Smith

VKS/ckp

cc: Stacy Gibson

APPENDIX 50 – MEDICAL RECORDS FROM STEPHEN E. SPENCER, M.D. DATED AUGUST 20, 1999, VERIFYING PETITIONER'S MEDICAL CONDITION LEFT HER UNABLE TO REPRESENT HERSELF

Patient Name: GIBSON, STACY A

Date of Birth: 08/30/1959

August 20, 1999

To Whom It May Concern:

Dear Sir:

Mrs. Gibson is a patient of mine. She has been under extreme duress for the past month related to her work. She has been extremely depressed and anxious and at times, has panic attacks. Her memory is extremely poor at times and she cannot focus. If she takes medication to reduce the anxiety, then she is too sleepy to focus or remember well. There is no way that she can adequately represent herself in the present emotional state.

Yours truly,

s/ Stephen E. Spencer MD
STEPHEN E. SPENCER, MD
SES:kc
D/D: 08/20/99
T/D: 08/20/99

APPENDIX 51 –LETTER FROM THE CANYON COUNTY CHIEF DEPUTY PROSECUTOR TO THE ADA COUNTY PROSECUTOR DATED AUGUST 20, 1999, NOTIFYING CRIMINAL CHARGES AGAINST GIBSON WERE INAPPROPRIATE

August 20, 1999

Mr. Greg Bower
Ada County Prosecutor
602 W. Idaho Street
Boise, Idaho 83702

Re: Stacy Gibson / DR#18613

Dear Greg:

After reviewing the above case, it is our determination that criminal charges would be inappropriate. There does appear to be a pretty solid civil action available.

Sincerely,

s/ John A. Christensen
JOHN A. CHRISTENSEN
Chief Criminal Deputy

JC\so

APPENDIX 52 – LETTER FROM SHERIFF'S LEGAL ADVISOR, R. MONTE MACCONNELL, DATED AUGUST 11, 1999, ACKNOWLEDGING GIBSON'S RIGHT AND DEMAND FOR A DUE PROCESS PRE-TERMINATION HEARING, ACKNOWLEDGING AWARENESS OF GIBSON'S MEDICAL CONDITION, ACKNOWLEDGING SALARY PAID TO GIBSON WAS IN ERROR, AND ADVISING GIBSON WOULD RECEIVE SALARY OWED TO HER, UP TO THE ACTUAL DATE OF TERMINATION

August 11, 1999

Vernon K. Smith, Esq.
1900 W. Main Street
Boise, Idaho 83702

Re: Stacy Gibson

Dear Mr. Smith:

As mentioned in our recent conversation, I am sending you the paycheck and claim for Ms. Gibson. Please have Ms. Gibson sign the claim form and return it to me. I have also enclosed a tape of her interview with Sgt. Johnson the Sheriff's Internal Investigator, and the documents which we believe establish our claim against Ms. Gibson. The other interview tape you requested has been sent to the Prosecutor as evidence. If you want that tape you must contact the Prosecutor's Office.

You will notice that Ms. Gibson is receiving her regular salary for the last pay period (July). All other hours to be at issue in this matter. Should Ms. Gibson be terminated from employment, she will receive the salary that is ultimately determined to be owed up to her actual date of termination.

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You have mentioned several times that your client would like to return the monies she was paid in error. If she would like to pursue this avenue, please advise me.

I also acknowledge receipt of your letter of August 6th, in which you indicate your demand for a hearing with the Sheriff. You also sent a letter from a Dr. Spencer in which the doctor says that Ms. Gibson cannot "participate in a hearing until further notice".

There is nothing that requires Ms. Gibson's presence at the hearing. You may represent her position as her attorney, she may submit a written statement setting forth her position, or we could hold a telephonic hearing. In any event, the Sheriff must hold this meeting in a timely manner. You have agreed to meet at 2PM on August 23d, waiving any objections to the delay. The meeting will take place in the Sheriff's Conference Room in Executive Suite at 7200 Barrister Drive. Ms. Gibson is on leave with pay until that time.

If you have any questions in this matter, please call me at your convenience.

Sincerely Yours,

VAUGHN KILLEEN
Ada County Sheriff

s/ R. Monte MacConnell
By: R. Monte MacConnell
Legal Advisor to the Sheriff

APPENDIX 53 – LETTER FROM THE ADA COUNTY PROSECUTOR DATED AUGUST 9, 1999, GRANTING AUTHORITY TO THE CANYON COUNTY CHIEF CRIMINAL DEPUTY PROSECUTOR TO FILE CHARGES AGAINST GIBSON, WITH THE INTENT TO HAVE CANYON COUNTY CHIEF DEPUTY PROSECUTOR "APPOINTED" AS SPECIAL PROSECUTOR, IN A FASHION CONTRARY TO IDAHO LAW

August 9, 1999

John Christenson
Canyon County Prosecutor
1115 Albany Street
Caldwell, ID 83605

Re: Stacy Gibson DR #18613

Dear John:

Please consider this letter your authority to file charges in this case if they are considered appropriate. Upon receipt of a letter stating you acceptance of this case and the case number, I will have you appointed as special prosecutor by the Honorable Judge Eismann. If you choose to decline, please respond in writing so that we can notify victims and officers

Thank you.

Sincerely,

/s Greg H. Bower

Appendix 53

GREG H. BOWER
Ada County Prosecutor

GHB:rp
Enclosures

APPENDIX 54 – MEDICAL RECORDS FROM STEPHEN E. SPENCER, M.D., DATED AUGUST 5, 1999, VERIFYING GIBSON'S MEDICAL CONDITION HAD NOT IMPROVED, AND SHE WAS INCAPABLE OF PARTICIPATING IN ANY HEARING UNTIL FURTHER NOTICE

Patient Name: GIBSON, STACY A

To Whom It May Concern:

RE: Stacy A. Gibson

Dear Sir:

Mrs. Gibson is a patient of mine who has been under tremendous emotional duress lately due to circumstantial difficulties. We are currently trying to stabilize her with medication but her condition has not improved to the point where she can participate in a hearing until further notice

Yours truly,

s/s Stephen E. Spencer, MD

STEPHEN E. SPENCER, MD
SES:kc
D/D: 08/05/99
T/D: 08/05/99

APPENDIX 55 – NOTICE OF INTENT TO IMPOSE DISCIPLINE [TERMINATION] ON GIBSON FROM ADA COUNTY SHERIFF DATED AUGUST 2, 1999, CONTAINING MISSTATED FACTS, FALSE CHARGES, CONTRARY TO ANY GOOD CAUSE TO TERMINATE EMPLOYMENT, AND ACKNOWLEDGING GIBSON'S RIGHT TO A DUE PROCESS PRE-TERMINATION HEARING

August 2, 1999

Deputy Stacy Gibson
5501 Tinker St.
Boise, ID 83709

RE: Notice of Intent To Impose Discipline

Dear Deputy Gibson::

Pursuant to Ada County Code, Section 1-7G-3.B, you are hereby formally notified that it is my intent to terminate you. In imposing this discipline, I find that you have violated Ada County Code, Section 1-7G-3.A (5), in that you conducted yourself in such a manner as to be detrimental to the good order and discipline of this department; and, (20), in that you knowingly made a materially misleading statement in an official report. You have also violated Section 9.04, of the Ada County Sheriff's Office Policy Manual, in that you conducted yourself in such a manner as to reflect unfavorably on this department and yourself. The specific facts giving rise to these charges are enumerated below.

Between November, 1998, and June, 1999, you signed eight Ada County Pay Claim forms which indicated your salary was $3050.00 (copies attached), knowing at the time that your monthly salary was $1550.00. This resulted in an overpayment

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to you in take-home pay of $8508.88. You failed to notify this office of this error in payment and have since made no effort to correct this overpayment or to repay the moneys to you in error. After reviewing the report on this matter, I am satisfied that you have violated both Ada County Personnel Code and Ada County Sheriff's Office Policies as enumerated above. Accordingly, it is my intent to terminate you from employment with the Ada County Sheriff's Office on August 7, 1999. We have been informed that Vernon K. Smith is your counsel in this matter and that all notices are to be delivered through him. As a result, a copy of this letter has also been sent to Mr. Smith.

You have a right to file a written response to this Notice of Intent to Impose Discipline within five (5) days of receipt of this letter. If you decide to file a response, you must personally deliver a copy to the Sheriff, the County Prosecuting Attorney and the County Personnel Director. This response will constitute an appeal of the action I have taken. Your failure to respond within the time provided will constitute a waiver of your right to appeal this action. A copy of Ada County Code Section 1-7G-3, has been enclosed for your information.

You are placed on Administrative Leave with pay until August 7, 1999, or until I have rendered my written decision following your reply and hearing. In the event you decide to appeal this matter further, you will be placed on administrative leave without pay pending completion of the appeal process, pursuant to Ada County Code Section 1-7G-3.F.

Sincerely Yours,

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/s Vaughn Killeen

VAUGHN KILLEEN
Ada County Sheriff

CC: Ada County Prosecuting Attorney
Ada County Personnel Officer

APPENDIX 56 –COMMUNICATION FROM ADA COUNTY PAYROLL DEPARTMENT DATED JULY 19, 1999, TO THE BUDGET DIRECTOR OF ADA COUNTY SHERIFF'S OFFICE

ADA COUNTY
PAYROLL DEPT.

Fax

TO:	*Kelli Bolicek*	*From:*	MERRILY WILFONG
Fax:	(208) 364-2202	Pages:	*6*
Phone:	364-2203	Date:	*7/19/99*
Re:	*OT HOURS*	CC:	

- Comments

Kelli—

Original in Mail.

Thanks,
s/ Merrily

Appendix 56

To: Kelli Bolicek
Date: July 19, 1999
From: Payroll
RE: OT Hours

Kelli,

Here is a copy of the OT sheets for the employees that were shorted pay from October 1998 through June 1999. The difference column is the amount that will be included in their *July* pay. If you have any questions please give me a call. Because we will be calling for vouchers on July 22nd, I will need the Personnel Action forms for these employees, turned in ASAP. Please let Doris know so we can get this cleared up this pay period.

Thanks for your help,

Merrily Wilfong (xt 2203)

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1903.50
446.50
$2350.00

WRIGHT, JUSTIN R. EMP #54476

DATE	OT EARNED	PAID	S/B PAID	DIFFERENCE
November-98	15.00-10.00	$140.76	$203.40	$62.64
April-99	6.00-4.00	$56.30 ✓	$81.36	$25.06
June-99	17.25-11.50	$161.85 ✓	$233.91	$72.06
		TOTAL OWED	[redacted]	159.76

GIBSON, STACY A. EMP #54224

DATE	OT EARNED	PAID	S/B PAID	DIFFERENCE
November-98	17.25-11.50	$151.71 ✓ 151.80	$303.60	$151.89
January-99	60.00-40.00	$527.70 527.40	$1,056.00	$528.30
April-99	54.00-36.00	$474.93 182.76	$950.40	$475.47
May-99	78.00-52.00	$686.01 687.32	$1,372.80	$686.79
June-99	18.00-12.00	$158.31 160.92	$316.80	$158.49
		1998.66 2031.62		
		✓ TOTAL OWED	[redacted]	
		$3296		

do not pay

18,600 = 36,6

BEST AVAILABLE COPY

Appendix 56

KOOPMAN, EDWARD B. EMP #54473

DATE	OT EARNED	PAID	S/B PAID	DIFFERENCE
November-98	11.50-7.67	$110.30	$159.28	$48.98
December-98	16.00-10.67	$153.41	$221.60	$68.19
January-99	3.00-2.00	$28.76	$41.55	$12.79
March-99	1.50-1.00	$14.43	$20.78	$6.35
April-99	3.00-2.00	$28.76	$41.55	$12.79
May-99	3.00-2.00	$28.76	$41.55	$12.79
			TOTAL OWED	[redacted] 161.89

WEBB, DENISE A. EMP #01417

DATE	OT EARNED	PAID	S/B PAID	DIFFERENCE
February-99	9.00-6.00	$118.29	$189.27	$70.98
March-99	9.00-6.00	$118.29	$189.27	$70.98
April-99	7.60-5.00	$98.63	$157.73	$59.10
			TOTAL OWED	[redacted] 201.06

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SEARCY, ANTONIO EMP #52296

DATE	OT EARNED	PAID	S/B PAID	DIFFERENCE
March-99	4.50-3.00	$58.78	$93.96	$35.18
April 99	10.50-7.00	$137.08	$219.24	$82.16

TOTAL OWED [redacted] 117.34

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NANCE, MIKE R. EMP #54474

DATE	OT EARNED	PAID	S/B PAID	DIFFERENCE
October-98	4.50-3.00	$62.33	$62.33	$0.00
November-98	19.50-13.00	$187.01	$270.08	$83.07
December-98	42.00-28.00	$402.69	$581.70	$179.01
January-99	65.25-43.50	$668.91	$903.71	$234.80
February-99	34.50-23.00	$330.83	$477.83	$147.00
March-99	14.25-9.50	$136.69	$197.36	$60.67
April-99	28.50-19.00	$273.30	$394.73	$121.43
June-99	3.00-2.00	$31.14	$45.00	$13.86
			TOTAL OWED	[redacted] 839.84

RASMUSSEN, SHELLIE EMP #53606

DATE	OT EARNED	PAID	S/B PAID	DIFFERENCE
November-98	12.00-8.00	$124.60	$180.00	$55.40
January-99	4.50-3.00	$45.35	$67.50	$22.15
February-99	17.13-11.42	$177.90	$256.95	$79.05
March-99	4.50-3.00	$46.77	$67.50	$20.73
April-99	30.38-20.25	$315.45	$455.70	$140.25
May-99	26.25-17.50	$272.63	$393.75	$121.22
			TOTAL OWED	[redacted] 438.80

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BUSTOS, JAVIER EMP #53781

DATE	OT EARNED	PAID	S/B PAID	DIFFERENCE
November-98	12.00-8.00	$124.60	$180.00	$55.40
May-99	10.50-7.00	$109.07	$157.50	$48.43
June-99	3.00-2.00	$31.14	$45.00	$13.86
			TOTAL OWED	[redacted] 117.69

KINZEL, MICHAEL A EMP #54074

DATE	OT EARNED	PAID	S/B PAID	DIFFERENCE
October-98	5.25-3.50	$75.71	$75.71	$0.00
November-98	12.00-8.00	$119.78	$173.04	$53.26
January-99	35.55-23.70	$383.44	$553.87	$170.43
February-99	2.25-1.50	$24.24	$35.06	$10.82
April-99	2.25-1.50	$24.24	$35.06	$10.82
June-99	19.75-13.17	$213.02	$307.71	$94.69
			TOTAL OWED	[redacted] 340.02

APPENDIX 57 – MEMORANDUM FROM SHERIFF'S LEGAL ADVISOR, R. MONTE MACCONNELL, DATED DECEMBER 23, 1997, CONFIRMING NON-COMMISSIONED DEPUTIES COULD NOT BE COMPENSATED UNDER FLSA § 207 k, AS THOSE DEPUTIES WERE NOT "LAW ENFORCEMENT PERSONNEL", AND EMPLOYEES COULD NOT WAIVE THEIR PROTECTIONS UNDER FLSA

MEMORANDUM

DATE: December 23, 1997

TO: Capt. Dan Douthit

FROM: Monte MacConnell
s/ RMM

SUBJECT: FLSA 7(k) Exemption

I have been asked if the office staff at BSU could voluntarily submit to be scheduled on a 4 x 12 work week under the exemption to the FLSA requirements.

Unfortunately, the answer I come up with is, "No". That exemption is only available to use with "law enforcement" personnel. The FLSA Handbook specifically provides that "Not eligible for the 207(k) exemption are civilian employees who engage in support activities, such as dispatchers, … clerks and stenographers." Para. 622. I read that provision to exclude office staff.

Further, "law enforcement" personnel are affirmatively defined to mean uniformed law enforcers with the power of

arrest and who have undergone specific law enforcement related training, ie., POST Academy. I do not think that includes the clerical staff of the ACSO.

I know that the BSU sub-office is trying to find a way out of the overtime problem, but I am afraid that there is no way to do that short of hiring another FTP. There is also case law which holds that employees may not waive their protections under the FLSA. So even if the BSU staff volunteers their time, we would have to compensate them at overtime rates.

cc: Lt. Cowles
Sgt. Rouse